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No. —

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Does a railroad violate the exclusive representation principle, which is an essential foundation of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, when, over the objection of the duly designated representative of employees, the railroad deals directly with represented employees on matters which are susceptible to collective bargaining?

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Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner District Lodge No. 19 of the International Association of Machinists and Aerospace Workers [hereinafter, "IAM"] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the sharply divided *en banc* decision of that Court in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988).

OPINION BELOW

The *en banc* decision of the court of appeals is reported at 850 F.2d 368 and is reproduced in the separate appendix filed with this petition as Appendix A at pages 1a-41a. The decision of the panel which was with-

drawn and vacated when the full court granted rehearing *en banc* is reported at 833 F.2d 730 and is reproduced in the appendix as Appendix B at pages 42a-63a. The district court's decision is not officially reported and is reproduced in the appendix as Appendix C at pages 64a-72a.

JURISDICTION

The court of appeals *en banc* decision reversing the permanent injunction which had been affirmed by the panel, was entered on June 22, 1988. Petitioner asked this Court to extend the time in which it may file this petition, and on September 13, 1988, that time was extended by Justice Blackmun to and including October 20, 1988. Sup. Ct. No. A-202, *IAM v. Soo Line R.R.* A subsequent extension was granted by Justice Blackmun on October 19, 1988, extending the time in which to file this petition until October 27, 1988. Those extensions totaling thirty-seven (37) days, are within the time period authorized by 28 U.S.C. § 2101(c), and this petition has been filed within that extended time period. Petitioner is seeking to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation of various provisions of the Railway Labor Act dealing with the duty to bargain established by Section 2 First of the Act, 45 U.S.C. § 152 First, and the principle of the Act that the duly designated representative of a craft or class of employees is the exclusive representative of all employees in that craft or class. That principle is expressed in Sections 2 Third, 2 Fourth, and 2 Ninth of the Act, 45 U.S.C. §§ 152 Third, 152 Fourth and 152 Ninth. Sections 2 Eighth and 6 of the Act, 45 U.S.C. §§ 152 Eighth, 156, are also relevant. Those statutory provisions have been reproduced in the separate appendix as Appendix E at pages 74a-77a.

STATEMENT OF THE CASE

This petition places before this Court another example of the prevalent tendency of courts today to examine virtually all Railway Labor Act controversies under the "major-minor" rubric [1] which frequently results in the courts declining to exercise jurisdiction over statutory violations. By applying the major-minor analysis to classify this statutory interpretation question as being a minor dispute—*i.e.*, one growing out of the interpretation of collective bargaining agreements—the Eighth Circuit has effectively deprived rail labor of a forum to enforce one of the essential foundations of the Railway Labor Act—the "affirmative duty [imposed by that Act] to treat only with the true representative, and hence the negative duty to treat with no other." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937). Unfortunately, the circumstances giving rise to this case do not present an isolated instance, for the question raised here is recurring all too frequently today as our nation's large railroads seek to reduce their employment levels by devising and implementing unilaterally programs whereby they purchase the seniority and other collectively bargained rights of employees. *E.g.*, *Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988).

This controversy is recurring today because, over the years, the railroads have entered into many agreements with rail labor that provide various forms of job guarantees to rail employees that either prohibit a carrier from reducing certain classes of employees (*e.g.*, limitations on subcontracting out of work) or require the carrier to pay wage continuation allowances to furloughed "protected" employees (*e.g.*, Mediation Agreement, dated February 7, 1965 in NMB Case No. A-7128). Those job security agreements limit a carrier's ability to reduce its forces as economically as some carriers desire, and this, along

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[1] *See*, note 6, *infra*, page 22.

with other reasons, has led to several rail carriers devising programs whereby they announce to certain classes of employees that the carrier will accept resignations from the employees, together with a relinquishment of all collectively bargained rights, in exchange for payment of a cash "separation allowance" and possibly other benefits. In this case, respondent Soo Line Railroad Company [hereinafter, "Soo"] made such an offer available to its employees, including several employees represented by petitioner IAM. It was respondent Soo's refusal to bargain with the IAM over that program and the Soo's unilateral implementation of that plan by dealing directly with the represented employees which led to the IAM's suit challenging that aciton, and has resulted in this petition.

A. Soo's Separation Pay Plan

In February 1985, respondent Soo was authorized by the railroad reorganization court supervising the reorganization of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "Milwaukee"] to acquire the rail properties of that debtor. Soo immediately exercised that authority by having a newly-formed, wholly owned subsidiary acquire those properties, hire the Milwaukee's employees, and assume the Milwaukee's collective bargaining agreements. *See, In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 329-30 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 2460 (1987). That sale, however, was conditioned by the requirement that the Soo provide certain procedural and monetary benefits—*i.e.*, the "Appendix B" conditions—to all Soo and Milwaukee employees who may subsequently be affected by that acquisition. *Id.*, 799 F.2d at 328-29. Rail labor was dissatisfied with the Appendix B conditions imposed by the reorganization court (*id.*), and most labor organizations subsequently entered into Employee Protective Agreements with the Soo to replace those conditions; petitioner IAM entered into such an agreement with the Soo on September 10, 1985. Joint Appendix in 8th Cir. No. 86-5355 [hereinafter, "J.A."] at 132.

That Employee Protective Agreement was intended to provide:

> [F]or fair and equitable arrangements to protect the interests of Employees adversely affected by the Acquisition; and to provide for expedited changes in services, facilities, operations, seniority and existing collective bargaining agreements to enable the expanded railroad system created by the Acquisition to be operated in the most efficient manner, as one completely integrated railroad.

J.A. at 103. That agreement adopted monetary benefits comparable to those provided by the Appendix B conditions as the wage guarantees for affected employees and provided a procedure for integrating the seniority of employees who followed their work to different points on the combined system. J.A. at 105-06. In exchange for those protections, the IAM agreed that:

> Subject to the requirements hereof, the Railroad [*i.e.*, Soo] may, at its discretion, commingle the work arising from the Core Assets [*i.e.*, Milwaukee] with the work arising from its assets, and may, at its discretion, transfer work throughout its new system, subject to the Protective Conditions. . . .

J.A. at 107 at § 6. In other words, the Employee Protective Agreement gave the Soo the right to move work from one part of its combined system to another, but in exchange for that right to "commingle work," the Soo agreed to integrate seniority and to provide monetary benefits to any employee who suffered a loss of earnings as a result of that "commingling."

Approximately two months after it entered into the IAM Employee Protective Agreement, the Soo offered a "Voluntary Separation Pay Plan" to some of its employees who were represented by the United Transportation Union [hereinafter, "UTU"]. That plan was implemented on December 11, 1985, when the Soo sent a letter to UTU represented employees informing them that they were "being offered *The Soo/Milwaukeee UTU (T&C) Voluntary Separation Pay Plan* which provides

you with a lump-sum payment if you desire to resign from the company and waive all rights under Appendix B and other labor protective conditions." J.A. at 45. Employees who opted for this Plan were to receive $15,000.00 for their resignations. Also, if the employee was 60 years of age or older, and wished to retire, the Plan provided health and welfare insurance benefits until age 65. J.A. at 45.

Respondent Soo informed the district court that it devised this plan for the following reasons:

> That because of the acquisition above mentioned, Soo Line has excess employees located throughout its system of railroad. To reduce the number of employees, and to give employees an opportunity to take early retirement or seek other employment, or for any other reason, the Soo Line offered a number of voluntary separation plans to its employees, including employees represented by labor organizations.

J.A. at 41. While that Plan was initially offered only to certain UTU represented employees, it was subsequently offered to engineers represented by another organization; a total of fifty-six (56) employees accepted those offers and "terminated their services with Soo Line." *Id.* According to respondent Soo, it did not negotiate about that plan with either the UTU or engineers' Organization. *Id.*

When the IAM General Chairman responsible for dealing with the Soo learned of the Plan being offered to employees, he contacted the Soo's labor relations officer on December 12, 1985, and was informed that the plan was not applicable to employees represented by the IAM. J.A. at 133. In February 1986, however, the IAM General Chairman learned that several Soo employees represented by the IAM had entered into separation agreements under the Voluntary Separation Plan. J.A. at 134. According to the Soo, it did not solicit those separation requests, but several IAM represented employees,

having learned of the separation offers to other crafts, asked the Soo for similar separation offers. J.A. at 42. Eight IAM represented employees' requests were honored through April 15, 1986, and those eight employees, who were all over 60 years of age, resigned and relinquished all collectively bargained rights in exchange for the lump-sum payment and medical insurance benefits. *Id.*

Those eight employees did not stand alone, for "numerous individual Soo Line employees from ten different labor organizations (other than UTU and BLE [*i.e.*, the engineers]) . . . also requested the separation pay plan and signed such pay plans as individuals and left the service of the Company on a voluntary basis." J.A. at 42. As the Soo added: "The Soo Line has not negotiated with any of the ten labor organizations representing these employees concerning the Voluntary Separation Pay Plans." *Id.* However, not all employees who requested paid separations were granted their request, for the Soo's response "to the individual requests varied depending on the operating needs at the facility involved." Transcript of May 28, 1986 Hearing [hereinafter, "Tr."] at 33. In fact, a request to separate by an IAM represented employee was denied by the Soo because it needed employees at his employment point. *Id.*

Once he learned of the Separation Plan being made applicable to IAM represented employees, the IAM General Chairman contacted the Soo Line's chief labor relations officer and advised him that the IAM "believed the unliateral action" by the Soo of "entering into private agreements" with employees represented by petitioner "was a violation of the Railway Labor Act and that the carrier should cease from entering into such agreements with members of the IAM." J.A. at 134. That conversation ended with a commitment by the Soo not to enter into any further separation agreements with IAM repre-

sented employees at that time, and the parties scheduled a meeting for March 5, 1986 to discuss this issue.[2]

Several conferences were held during March and April 1986, at which time the parties discussed the Soo's proposal and the IAM's concerns regarding that program. One concern raised by the IAM was the possibility that the carrier would reduce its forces to such a low level that it would be able to contract out Machinist work under an agreement which permitted subcontracting if there was insufficient manpower at the facility to handle the work. Tr. at 16. Respondent Soo replied that it could not give any guarantees that it would not so reduce its forces. *Id.* Another area of discussion was the number of facilities where the program would be applicable and the number of employees at each facility who would be eligible for a paid separation. J.A. at 12-23, 135.

On April 23, 1986, the Soo advised the IAM that if it did not sign the proposed agreement, the Soo would put the proposal into effect beginning April 28, 1986. J.A. at 24, 135. Respondent Soo's position was stated in a letter to the IAM delivered on April 23, 1986, as follows (J.A. at 24):

> This is to acknowledge your advice to the Carrier that you object to the Carrier honoring requests by members of your organization for separation allowances without an agreement with your organization. We don't agree with your position. We have had several employees who have requested a separation and we intend to honor those requests. We do not

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[2] In its decision, the district court characterized that and subsequent conferences as "negotiations." App. C at 65a. Respondent Soo, however, maintained that the conferences were "without prejudice to the carrier's rights to unliaterally accept separation requests from Machinist employees in the event the carrier and the Machinists organization were unable to agree on a method for offering separation pay plans to Machinists." J.A. at 43.

> view this as a violation of the Railway Labor Act but taking your position into account, this will also advise you that we will not honor any such separation requests involving members of your organization prior to Monday, April 28, 1986.

B. Court Proceedings

Petitioner declined to sign the agreement proffered by the Soo and filed a complaint with the United States District Court for the District of Minnesota seeking declaratory and injunctive relief both to enforce the prohibition in the Railway Labor Act against a railroad bargaining with or entering into agreements with individual represented employees, and to enforce the Act's bargaining and status quo requirement. J.A. at 1-8. Respondent Soo answered that complaint by stating in part that it "did not violate any terms of an existing collective bargaining agreement or any provision of the Railway Labor Act by entering into voluntary separation pay plans with these individuals." J.A. at 61. According to the Soo, there were "no specific provisions governing this type of activity" in the applicable collective bargaining agreements, and therefore, the Soo cannot be said to be making "any effort to formally change terms of an existing agreement or create a new one." Tr. at 60-61. Respondent Soo then added that if a dispute under the Railway Labor Act did exist in this case, it must be a "minor" dispute subject to the exclusive jurisdiction of the adjustment boards under Section 3 of the Act, 45 U.S.C. § 153. *Id.* at 61.

Petitioner IAM moved for interim injunctive relief and the trial court, with the consent of both parties, advanced the trial on the merits pursuant to Rule 65 (a)(2), Fed. R. Civ. P., and heard two witnesses. Tr. at 3-4. On August 14, 1986, the trial court issued a decision and order permanently enjoining the Soo from entering into individual separation agreements with IAM represented employees until the railroad had complied fully with the notice and bargaining requirements set

forth in Section 6 of the Railway Labor Act. App. C at 72a. In reaching the conclusion to issue that injunction, the court first rejected the Soo's assertion that the dispute was a minor one under the labor statute. In the Court's opinion, the dispute was a major one for the following reasons (*id.* at 68a-69a):

> This is because the Court is not called upon to review the status of either labor or management at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an interemployment relationship, but the fundamental nature of the employment relationship itself.
>
> Both parties agree that there is no provision in the existing agreements between the Union and Soo Line allowing solicitation of individual union members or for individual lump-sum separation agreements. Under the *Elgin* [*i.e.*, *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945)] definition and the decisions of the other courts which have faced the jurisdictional issue in the present context, this dispute is major, and this Court therefore has jurisdiction over it.

After concluding that it had jurisdiction, the district court addressed the IAM's assertion that the Soo, by dealing directly with employees, had violated its obligation to deal solely with the IAM as the exclusive representative, and found that the IAM was correct. As the court summarized (App. C at 70a):

> If these company individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies.

Respondent Soo appealed to the United States Court of Appeals for the Eighth Circuit, but on November 12, 1987, a panel of that Court, with Judge Magill dissenting, affirmed the judgment. App. B at 42a. First, the panel looked to the claim that a statutory violation issue was asserted as the basis for the jurisdiction. The panel then stated that: "Under the RLA, the Soo Line has an obligation to bargain collectively with the Machinists' Union and to refrain from interferring with the Union's representation of its members." App. B at 47a. That obligation, the panel held, was violated here, because the Soo entered into agreements with individual employees that "have an adverse impact on the machinists as a group." *Id.* at 50a. Respondent Soo's assertion that the dispute was a minor one was rejected because "[t]he dispute does not involve interpretation of either the collective bargaining agreement or the labor protective agreement. It rather involves an effort on the part of the Soo Line to ignore both of these agreements and to negotiate individually with the employee on a matter which is a subject of mandatory bargaining." *Id.* at 51a.

Respondent Soo petitioned for rehearing and the court voted to hear the case *en banc*; at the same time, the court withdrew and vacated the panel's decision. App. A at 3a n.2. On rehearing, five of the circuit judges joined a decision authored by Judge Magill which reversed the district court because, in the majority's opinion, the "crucial" question presented by this case was whether the Separation Plan violated the Employee Protective Agreement; that issue, the majority concluded, presented a minor dispute subject to the exclusive jurisdiction of the adjustment boards. App. A at 17a, 28a. Petitioner IAM's reliance on its exclusive representative status to invalidate the Soo's direct dealing with employees was put aside by the majority's statement that this Court has spoken on this issue and "has stated, simply, that certain individual employment contracts may exist side-

by-side with a collective bargaining agreement." *Id.* at 14a. According to the majority, whether the Soo had engaged in direct dealing depended upon whether the individual separation agreements conflicted with the existing collective agreements, but only an adjustment board could determine that issue since the Soo's assertion of a "retained 'management prerogative'" to justify its individual plans was not frivolous. *Id.* at 18a, 25a. The full court thereupon reversed and remanded the case "for arbitration." App. D at 73a. Four of the judges on that court dissented in two separate opinions, one by Chief Judge Lay, joined by Judge McMillian (*id.* at 29a), and one by Judge Heaney, joined by the other three dissenters. *Id.* at 32a.

In his dissent, Chief Judge Lay noted that the fundamental question was not whether the Employee Protective Agreement may be interpreted to conflict with the Separation Plan, but "whether the railroad has a unilateral right to enter into voluntary separation agreements with individual employees that significantly affect the rights of other employees." App. A at 29a (footnote omitted). Judge Lay concluded by stating (*id.* at 32a):

> The majority opinion is simply wrong. To allow this error to persist and become precedent under the RLA will be catastrophic. The effect of the opinion is to cast distrust on the mechanisms Congress has designed to maintain industrial peace under the Railway Labor Act. . . . .

REASONS FOR GRANTING THE WRIT

I. It Is Important To The Orderly Administration Of the Railway Labor Act That This Court Clarify That The Principle Of Exclusive Representation Prohibits A Rail Carrier From Dealing Directly With Its Employees, Over The Objection Of Their Exclusive Bargaining Representative, On A Matter Susceptible To Collective Bargaining

This Court has long emphasized that one of the essential foundations upon which the Railway Labor Act has been structured is the principle that the duly designated representative of a craft or class of employees is the exclusive representative of that entire craft or class. *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *accord, Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 200 (1944). That principle of exclusive representation is also applicable to the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.*, and indeed, is explicitly set forth in Section 9(a) of that statute, 29 U.S.C. § 159(a). *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937). As this Court explained in *Virginian Railway*, 300 U.S. at 548, the obligation imposed on the carrier by Section 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, to treat with the duly designated representative of a craft or class of employees "imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

At the same time that the Court emphasized the negative duty to treat with no other, this Court explained that within that limit the labor statutes should not be read "as precluding such individual contracts as [the employer] . . . may elect to make directly with individual employees." *Virginian Railway*, 300 U.S. at 549; *see also, Jones & Laughlin*, 301 U.S. at 45. However, as explained below, this Court subsequently concluded that this apparent exception for individual contracts is ex-

ceedingly narrow. Moreover, petitioner IAM submits, this Court has further found that such an exception does not exist for matters susceptible to collective bargaining where the parties have not expressly reserved those particular situations for individual contracting. This case presents the question of whether there is an exception to the general exclusive representation principle that allows an employer to deal directly with its employees over the objection of the representative.

According to the court of appeals in this case, there is such an exception allowing an employer to bargain with its employees directly, over the objection of the designated representative, for contracts which do not "violate or undermine" existing collecitve bargaining agreements. App. A at 18a. That description of the scope of permissible individual bargaining, petitioner IAM respectfully submits, is contrary to decisions by this Court defining the scope of such bargaining under the NLRA,[3] which historically and logically should be applicable to the Railway Labor Act on this issue. Moreover, the court of appeals' decision is in conflict with this Court's decision in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).

A. This Case Presents A Recurring Problem, The Correct Resolution Of Which Is Important To The Entire Rail Industry

This case does not present an isolated instance of a carrier seeking to enter into individual separation agreements with represented employees, but, rather, presents a factual situation which is occurring all too frequently today. Indeed, it is very possible that this problem will increase in its frequency in the near future as our na-

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[3] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *accord, Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2431-33 (1987); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

tion's railroads seek to reduce their forces by "buying jobs."

Between 1970 and 1986, rail employment on Class I railroads declined by 48% (United States Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* at 570, Table No. 978 (1988)), and that downward trend is continuing as railroads seek to reduce forces to decrease their costs. *E.g., CSX Buyout*, Journal of Commerce at 2B, col. 4 (October 4, 1988) (CSX to reduce its forces by 10,000 employees). However, rail management has in the past entered into agreements with rail labor which provide various forms of job security to rail employees. Those job security arrangements, be they a limitation on subcontracting (*see*, Tr. at 21) or a form of wage guarantee as provided by the Employee Protective Agreement in this case, limit the cost savings which a carrier can achieve when it reduces forces. It is for this reason primarily that railroads are willing to pay separation allowances to employees who are willing to sell their seniority in exchange for payments which range from $2,000.00 to $75,000.00 per separation.

Separation allowances for voluntary separations first became a problem in this industry in the early 1980's (*e.g., Brotherhood of Railway Clerks v. Chesapeake & Ohio Ry.*, 115 L.R.R.M. 3635 (N.D Ohio 1983)) and began to occur more frequently since 1985. *E.g., Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988); *Southern Pacific Transportation Co. v. Brotherhood of Railway Clerks*, 636 F.Supp. 57 (D. Utah 1986); *see also, Brotherhood of Railway Carmen v. Atchison, Topeka & Santa Fe*, N.D. Texas Civil Action No. 3-88-0089-T (pending on cross-motions for summary judgment). Initially, rail labor was successful in preventing this violation of the principle of exclusive representation, but that has recently been changed by the *Soo Line* and the Seventh

Circuits' *Santa Fe* decisions' improper reliance on adjustment boards to avoid the statutory interpretation questions presented by the railroads' actions.

Since the railroads believe that they must continue to reduce forces, it is highly likely that the problem presented by this case will occur again, and most likely with a greater frequency. If the principle of collective bargaining is to be preserved in this area, it is crucial that this Court review the Eighth Circuit's decision and determine whether that decision conflicts with this Court's rulings in *Railway Express* and *Medo Photo*.

B. The Decision of the Eighth Circuit Conflicts With Applicable Decisions of This Court

Decisions by this Court since *Virginian Railway* and *Jones & Laughlin* have shown that the scope of permissible individual bargaining is exceedingly narrow and, petitioner submits, is further curtailed by the procedural limitations which the labor Acts place upon an employer's right to enter into unilateral agreements. First, in *J.I. Case*, *supra*, note 3, this Court observed that the Court in *Virginian Railway* and *Jones & Laughlin* "recognized the existence of some scope for individual contracts, but it did not undertake to define it or to consider the relations between lawful individual and collective agreements . . . ." 321 U.S. at 336. *J.I. Case* then proceeded to examine those issues, and, in particular, the relationship between lawful individual and collective agreements, explaining that a collective bargaining agreement is actually a "trade agreement" which governs the employment relationship of employees once they are hired by individual contracts. 321 U.S. at 335. Individual contracts, however, "cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreemnt." 321 U.S. at 338. The Court then added (321 U.S. at 339):

> Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of the contracts applicable, and to the Labor Board if they constitute unfair labor practices.[4]

A second limitation on the scope of individual bargaining was touched upon in *J.I. Case* and further developed that same term in *Medo Photo*, *supra* note 3. In *J.I. Case*, this Court stated that (321 U.S. at 337):

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, . . .; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. . . .

This "procedural" limitation on the right of an employer to deal directly with employees was amplified in *Medo Photo* when this Court upheld a ruling by the Labor Board that an employer had violated the NLRA by bargaining directly with represented employees on matters that were the subjects of ongoing bargaining with the certified representative. As this Court explained (321 U.S. at 684):

> The statute guarantees to all employees the right to bargain collectively through their chosen representa-

---

[4] This point was relied upon by this Court in *Caterpillar*, *supra* note 3, to conclude that *all* individual contracts were not necessarily subsumed into, or eliminated by, the collective bargaining agreement. 107 S. Ct. at 2431. However, as the *Caterpillar* decision makes clear, the individual contracts in that case were made at a time that the employees were not represented. Moreover, the Court noted that a question concerning the validity of the contract is different than the question of whether the making of such a contract violated the exclusive representation principle in Section 9(a) of the NLRA. 107 S. Ct. at 2432 n.12.

> tives. Bargaining carried on by the employer directly with the employees, whether a minority or majority, who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field, has found.

That principle was not new, for as the Court added (321 U.S. at 684):

> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions was recognized by this Court in *J.I. Case* . . . .

While *J.I. Case* and *Medo Photo* were not Railway Labor Act cases, in this area the Railway Labor Act and the NLRA have developed in a uniform fashion. The principle of exclusive representation is essentially the same under both Acts, and this Court has relied upon earlier Railway Labor Act cases to develop the NLRA law in this area. *See*, *Medo Photo*, 321 U.S. at 684; *J.I. Case*, 321 U.S. at 336. Thus, it is logical to look to NLRA cases to construe the scope of the exclusive representation concept under the Railway Labor Act. Indeed, this Court did just that in *Railway Express*, *supra*, which was decided on the same day that the *J.I. Case* decision was entered, for as this Court noted in *Railway Express*, 321 U.S. at 347: "The decision in J. I. Case . . . considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here."

Although *Railway Express* dealt specifically with the relation between individual contracts and the collective agreement, that case also involved carrier actions which were condemned subsequently in *Medo Photo*, in part, based on *Railway Express*. *See*, 321 U.S. at 684. In

Railway Express, the carrier, over the objection of the employees' representative, entered into contracts with several agents dealing with compensation, and an adjustment board subsequently sustained the union's claim that the collective agreement superseded the individual contracts. This Court ruled that the award should be enforced, in part because "the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force throughout the period and . . . the carrier's efforts to modify its terms through individual agreements [were] . . . not effective." 321 U.S. at 347. Thus, *Railway Express* shows that a carrier may not bypass the collective bargaining representative or the bargaining procedures of the Act in entering into agreements with its employees.

J.I. Case, *Medo Photo* and *Railway Express* show that questions concerning the enforcement of individual contracts negotiated in conformity with the labor Acts are distinct from questions concerning the right of an employer to bypass the employees' representative in entering into such agreements in the first place. Individual contract enforcement questions may involve an issue—*i.e.*, whether an individual contract obtained as the result of an "unfair labor practice" may be used by an employer to disadvantage the employee (*see*, *J.I. Case*, 321 U.S. at 336)—which is not present in cases dealing with the lawfulness of the bypassing of the designated representative. Moreover, as occurred in both *J.I. Case* and *Caterpillar*, the individual agreement may have been entered into at a time when the employee was not part of a represented unit. Consequently, petitioner IAM submits, it is entirely improper to read *J.I. Case* or *Railway Express*, as the court of appeals did, as sanctioning the bypassing of the union to make individual contracts that may, or may not, interfere with or undermine the collective bargaining agreements.

Whether the individual contracts have such an undermining effect is immaterial to the lawfulness of the by-

passing of the union, for the evil of that action is its impact on the ability of the majority to bargain through their collective representative:

> [E]ffective collective bargaining has been generally conceded to include the right of the representatives of the unit to be consulted and to bargain about the exceptional as well as the routine rates, rules, and working conditions. Collective bargains need not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits. Had this proposed rate of pay been submitted to the collective bargaining process it might have been settled thereby or might have resulted in an agreement that the company should be free to negotiate with the agents severally. But the Company did not observe the right of the representatives of the whole unit to be notified and dealt with concerning a matter which from an employee's point of view may not be exceptional or which may provide a leverage for taking away other advantages of the collective contract.

Railway Express, 321 U.S. at 347.

In this case, the Eighth Circuit viewed the direct dealing question through the standards applicable, at best, to questions concerning an employee's efforts to enforce his individual separation agreement. But that was not the question decided by the district court, for the trial court enjoined the Soo from bypassing the IAM and the Railway Labor Act's notice, bargaining and status quo requirement. The validity of that injunction required an analysis of whether the Soo had violated the Railway Labor Act's exclusive representation principle by dealing directly with the employees, over the objection of the union, on a subject which the record shows, and the majority reluctantly agreed, was susceptible to collective bargaining. App. A at 14a; *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330,

338 (1960) ("whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves"). However, by applying the wrong standard to determine whether the Soo had impermissibly dealt directly with its employees on a collective bargaining matter, the Eighth Circuit has effectively nullified the exclusive representation principle in this and similar cases.

Railway Express is still good law, and this Court has relied upon that precedent to support the conclusion that the exclusive representation principle means that members of a represented craft or class "cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining" (*Steele v. Louisville & Nashville R.R.*, *supra*, 323 U.S. at 200), and that a carrier "may not supersede the agreement by individual contracts even though particular employees are willing to enter into them." *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966). Nevertheless, the *en banc* Eighth Circuit has now concluded that whether a carrier can enter into negotiations with individual employees, over the objection of the union, depends on whether or not the proposed individual agreement violates or undermines an existing collective bargaining agreement. This is clearly not the proper test under the NLRA (*e.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, *supra*, note 3, 388 U.S. at 180), and, petitioner IAM submits, is not, and should not, be the test under the Railway Labor Act. Since the principle of exclusive representation is so important to the orderly administration of this essential labor statute, the Eighth Circuit's decision making that right unenforceable should be examined by this Court.

II. This Court Should Review This Case Since Both This Decision And One By The Seventh Circuit Have Severely Limited Rail Labor's Ability To Enforce The Exclusive Representation Principle Of the Railway Labor Act

Unlike the NLRA, which created an expert administrative tribunal to enforce the commands of that statute, the Railway Labor Act does not provide an administrative forum to enforce its commands. Rather, Congress has given the federal courts jurisdiction and, the IAM respectfully submits, the duty to enforce the commands of that labor statute.[5] *E.g., Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930); 28 U.S.C. § 1337(a). However, in this case the *en banc* Eighth Circuit has "remanded for arbitration" the IAM's efforts to prevent the Soo from dealing directly with represented employees over the IAM's objections. App. A at 29a. Since adjustment boards under the Railway Labor Act do not have jurisdiction to enforce the Act's statutory commands (*see*, 45 U.S.C. § 153 First(i)), that remand effectively deprives the IAM of a forum in which to enforce the statute's principle of exclusive representation.

In this case, the Eighth Circuit concluded that the IAM's efforts to enforce the statute's exclusive representation principle created a "minor" dispute[6] which

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[5] This lack of an administrative forum to enforce the Act's commands also means that rail labor must look solely to the courts to construe the obligations and correlative rights imposed by that statute. Consequently, an erroneous court decision improperly limiting the protections which that Act gives employees, may have a more disastrous impact under the statute than under the NLRA.

[6] Railway Labor Act disputes over rates of pay, rules or working conditions are generally divided into two classes. Disputes over changes in agreements are "major" and are not subject to compulsory arbitration; disputes over the interpretation of existing agreements are "minor" and are subject to compulsory adjustment. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945).

must be submitted to the adjustment boards for resolution. That dispute, according to the appellate court, was whether the individual separation agreements conflicted with the Employee Protective Agreement or with the rules agreement; but that question, as shown above, is immaterial. Moreover, both the IAM and Soo have acknowledged over and over in this case that there is no provision in any collective bargaining agreement which covers individual separation agreements. Tr. at 60-61. Consequently, there is no contractual provision which an adjustment board can construe as reserving "by agreement" certain subjects for individual contracting. *Railway Express*, 321 U.S. at 347. In other words, the adjustment boards have no jurisdiction over any aspect of this case and, thus, can add nothing to a resolution of the controversy over the validity of the Soo's bypassing of the IAM.

But even if the adjustment board were to consider the issue as framed by the Soo, it could still not resolve this controversy over the lawfulness of the Soo's bypassing of the IAM in dealing directly with the employees. According to the Soo, the Separation Plan was "outside the scope of any labor agreement with the IAM [and was] . . . an additional benefit afforded to IAM employees . . . ." J.A. at 34. That fact, the Soo asserted, meant that it had an unrestricted right to enter into such separation agreements, and any dispute over the existence of that right was a minor dispute. Even if it were assumed that the Soo had an inherent right not restricted by any contract to enter into individual separation agreements, that assumption would not justify the Soo's conduct here, for the IAM has asserted that the Railway Labor Act's exclusive representation principle outlaws direct dealing. An adjustment board has no jurisdiction to rule on the IAM's arguments regarding the parameters of the exclusive representation principle, for only a federal court can construe the scope of that principle and determine its impact on the Soo's management prerogatives.

Unfortunately, this case does not stand alone in relegating rail labor to the adjustment boards to enforce the exclusive representation principle, for recently the Seventh Circuit reached a similar conclusion in *Brotherhood of Railway Clerks v. Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403 (7th Cir. 1988). But this is where the similarity between the two cases ends, for the rationale used by the Seventh Circuit to conclude that the union's enforcement action should be submitted to an adjustment board bears no resemblance to that employed by the Eighth Circuit in this case. Indeed, both cases are irreconcilable. However, what is relevant to this petition is the total lack of clear instructions from these appellate cases to the rail industry and to the trial courts on this important and recurring issue. Moreover, those decisions have placed in question principles which were firmly established by *Railway Express* and *Medo Photo*.

Although the Seventh Circuit also required rail labor to proceed before an adjustment board to resolve the claim involved in that case, it did so for entirely different reasons than employed by the Eighth Circuit. Unlike the IAM's case, the *Santa Fe* case involved a claim that individual separation plans had, by the conduct of the parties, become "an established part of the parties' understanding of their contract"—*i.e.*, that the union had agreed to reserve certain areas for individual contracting. *Santa Fe*, 847 F.2d at 406. That claim, the *Santa Fe* courts opined, was not frivolous, and thus presented a minor dispute which had to be resolved by an adjustment board.[7] 847 F.2d at 408. The Seventh Circuit then addressed the issue of whether it should exercise jurisdiction over the union's contention that the Act's principle of exclusive representation had been violated; it con-

[7] Rail labor submits that the Seventh Circuit erred on this point, for the court, and not the adjustment board, has the obligation to determine whether a union has waived the statutory prohibition against direct dealing.

cluded that it should not because, in its opinion, the validity of the direct dealing could be determined by an adjustment board. 847 F.2d at 408-12. What that conclusion fails to take into consideration, however, is the fact that an adjustment board cannot enforce the Act's exclusivity principle.

When the two cases are compared, it becomes apparent that there is no consistent rationale upon which the rail industry can rely to determine whether direct dealing is or is not prohibited. All that the parties know is that the federal courts will not enforce the exclusive representation principle if there is an arguable basis upon which to remit rail labor to the adjustment boards. What happens at that point is beyond anyone's power to predict.

Petitioner IAM respectfully submits that this Court has long recognized that it "is a violation of the essential principle of collective bargaining . . . for the employer to disregard the bargaining representative by negotiating with individual employees . . . with respect to wages, hours and working conditions . . . ." *Medo Photo*, 321 U.S. at 684. Whether or not the Soo's conduct in this case has violated that principle is a question of statutory interpretation over which the adjustment boards have no jurisdiction.

To ask the adjustment boards to address the direct dealing question, as Chief Judge Lay stated in his dissent, "is simply wrong." App. A at 32a. And, as Judge Lay all too accurately predicted: "To allow this error to persist and become precedent under the RLA will be catastrophic." *Id.*

CONCLUSION

For the reasons set forth above, petitioner IAM respectfully requests that this Court grant the writ.

Respectfully submitted,

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Date: October 27, 1988

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88-701
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5355

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19, an- unincorporated labor organization,

Appellee,

v.

SOO LINE RAILROAD COMPANY, a Minnesota corporation,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: February 12, 1988

Filed: June 22, 1988

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL and BEAM, Circuit Judges, *en banc.*

MAGILL, Circuit Judge.

In this case we examine whether an employee has the right to seek out his employer and voluntarily quit his

job on terms agreeable to both him and his employer, or whether that basic right must be bargained for on his behalf by his union. The Soo Line Railroad Company (Soo Line) appeals from a decision of the United States District Court for the District of Minnesota, permanently enjoining the Soo Line from entering into voluntary separation agreements with individual members of the International Association of Machinists and Aerospace Workers, District Lodge No. 19 (IAM or Union).

The Soo Line contends on appeal that the district court did not have subject matter jurisdiction over the disagreement between the Soo Line and IAM because (1) the disagreement between them is not a dispute, as that term is used in the Railway Labor Act, 45 U.S.C. §§ 151-188 (RLA); (2) even if the disagreement is a dispute within the ambit of the RLA, it is a minor dispute subject to resolution by the National Railroad Adjustment Board; and (3) the pertinent agreements between the Soo Line and IAM require arbitration of any dispute arising out of their interpretation or application, and this is such a dispute.

We discuss these sequentially. Section 2 of the Railway Labor Act, 45 U.S.C. § 151a, sets out the disputes to which it applies as "all disputes concerning rates of pay, rules, or working conditions" and "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." As we explain more fully in Section II(B), numerous courts have assumed the presence of a labor dispute in situations similar to the one at issue.[1]

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[1] Moreover, as we will explain in greater detail, a pertinent agreement in this case contains arbitration clauses. As this court has stated:

> [W]hen disagreement arises between the parties whether a particular dispute is arbitrable under the terms of the governing labor agreement, courts will broadly construe the agreement in favor of arbitrability, resolving doubts on the side of

We therefore base our decision on the Soo Line's second and third arguments. Accordingly, we conclude that the district court erroneously asserted equitable jurisdiction in this case, and we reverse and remand for arbitration.[2]

I. Background

This case has its genesis on February 19, 1985, when the Soo Line acquired the core rail assets of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) from its trustee in bankruptcy. Two statutory regimes governed the Soo Line's acquisition of Milwaukee (Acquisition): the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-922 (the Restructuring Act), and the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (ICA).

A. The Restructuring Act.

The Restructuring Act was passed as an emergency measure to restructure the financially ailing Milwaukee, in order to avoid the potential unemployment and economic damage that would result if the Milwaukee were to cease operating. 45 U.S.C. § 901(b). The Restructuring Act primarily sets out procedures through which courts, the Secretary of Transportation, and the Interstate Commerce Commission (ICC) may supervise trans-

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the board's authority. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-53, 4 L. Ed. 2d 1409 (1960); *Zeviar v. Local 2747, [Airlines, Aerospace and Allied Employees*, 733 F.2d 556, 559 (8th Cir. 1984)]; *Lackawanna Leather v. United Food & Commercial Workers*, 706 F.2d 228, 230-31 (8th Cir. 1983) (en banc).

Ozark Air Lines, Inc. v. Air Line Pilots Association, Int'l, 744 F.2d 1347, 1350 (8th Cir. 1984), *aff'd en banc by an equally divided court*, 761 F.2d 1259, *cert. denied*, 474 U.S. 903 (1985).

[2] The panel opinion previously filed, 833 F.2d 730 (8th Cir. 1987), was withdrawn and vacated when the petition for rehearing *en banc* was granted.

actions pertaining to the Milwaukee, such as sales, transfers, abandonments, and conversion plans. 45 U.S.C. §§ 903-905, 915. The Restructuring Act also sets out a variety of protective measures for Milwaukee employees, 45 U.S.C. §§ 907-914.

The Restructuring Act required the Soo Line, as a condition of the Acquisition of Milwaukee, to provide protections for potentially affected employees. Section 904(b)(1) of the Restructuring Act set out the level of protection required, and authorized the federal district court supervising the Acquisition (reorganization court) to decide for itself what specific labor protective conditions should be imposed. Section 904(b)(1) provides: "In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code." (Section 11347 of the ICA.)[3] This mandate brings us to the second of two statutes governing the transaction, the ICA.

B. The ICA Protective Agreement.

As this court recently stated in *Burlington Northern Railroad Co. v. United Transportation Union*, Nos. 87-2581, 87-2600, slip op. at 6-7 (April , 1988), the goal of the ICA is to make commerce flow smoothly, to the benefit of both American industry and consumers. The ICA seeks to ensure fair shipping rates, safety and efficiency in transportation, and to preserve the viability of various modes of transportation. *See* 49 U.S.C. § 10101, 10101a.

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[3] Section 11347 requires the carrier to provide a fair arrangement at least as protective of the interests of employees as the terms imposed under section 11347 prior to February 5, 1976 (the date the section was amended) as well as those established under section 405 of the Rail Passenger Service Act, 45 U.S.C. § 565.

The ICA generally requires that before a railroad acquires an additional line, the rail carriers involved in the transaction must obtain the approval of the ICC. 49 U.S.C. § 10901. In furtherance of the ICA's goal of preventing labor strife by "encourag[ing] fair wages and safe and suitable working conditions in the railroad industry," 49 U.S.C. § 10101a(12), the ICC, before approving a particular transaction, has generally required the imposition of plans to compensate workers displaced by the transaction. *See* 49 U.S.C. § 11347. These plans are called labor protective provisions or agreements. Under the authority granted by the ICA, the ICC has developed standard labor protective provisions for particular types of transactions. When the transaction involves the sale of a rail line, such as here, the ICC imposes the *New York Dock* conditions upon the parties. *See New York Dock Railway—Control—Brooklyn E.D. Terminal*, 360 I.C.C. 60 (1979), *aff'd*, 609 F.2d 83 (2d Cir. 1979).

The *New York Dock* conditions provide essentially that any employee furloughed as a result of a merger or similar transaction must be paid, generally for six years, the equivalent of the wage earned at the time of the adverse action, unless he or she chooses instead to take a one-time payment of up to one year's pay (valued at approximately $38,000 per employee in this case); that issues pertaining to seniority and contract rights between the employees of the two merged railroads must be resolved by an implementing agreement with the consolidated railroad's unions; that existing collective bargaining agreements must be preserved; and that mandatory and binding arbitration be used to resolve "any dispute or controversy with respect to the interpretation, application or enforcement of any provision" of the *New York Dock* conditions.[4]

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[4] Section 11 of the *New York Dock* conditions contains a mandatory arbitration clause which provides, in pertinent part:

[Continued]

The Soo Line informed both the ICC and the reorganization court that several hundred employees would lose their jobs as a result of the Acquisition. *See Matter of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 799 F.2d 317, 328-29 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 2460 (1987). The ICC recommended that the *New York Dock* conditions be imposed upon the Acquisition, and the reorganization court, except for making minor changes,[5] applied the *New York Dock* conditions.

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[4] [Continued]

> 11. *Arbitration of disputes.*—(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, * * * it may be referred by either party to an arbitration committee.

This court has recently held that arbitration clauses identical to those at issue here mandate compulsory arbitration of "any dispute" between the parties relating to *New York Dock* protections. *Hoffman v. Missouri Pacific Railroad*, 806 F.2d 800, 801 (8th Cir. 1986). Even though these arbitration clauses say disputes "may" be referred to arbitration, the clauses nevertheless make the arbitration both mandatory and binding. *Hoffman*, 806 F.2d at 801.

[5] As explained by the court in *Matter of Chicago*, 799 F.2d at 329:

> The principal difference between the "Appendix B" conditions [those conditions actually imposed in this case] and the *New York Dock* conditions is that although *New York Dock* requires the railroad to notify employees of impending changes 90 days in advance, and to negotiate with the unions concerning their consequences until agreement is reached, "Appendix B" shortens the time to ten days and allows the railroad to make the changes whether or not the unions consent. "Appendix B" also requires that any employee injured by this accelerated schedule be made whole. *See In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 658 F.2d 1149, 1151-52 (7th Cir. 1981) (*Protective Conditions*), *cert. denied*, 455 U.S. 1000, 102 S. Ct. 1632, 71 L. Ed. 2d 867 (1982), for a description of the difference.

For purposes of clarity in this opinion, the conditions imposed will be referred to as the *New York Dock* conditions.

Accordingly, on September 10, 1985, the Soo Line entered into an employee protective agreement (Protective Agreement) with Milwaukee and IAM. The Protective Agreement, which incorporated the *New York Dock* conditions in conformity with the reorganization court's order, was meant to provide standard labor protective provisions pursuant to section 11347 of the ICA and the Restructuring Act. As described in its preamble, the purpose of the Protective Agreement was:

> to provide * * * for fair and equitable arrangements to protect the interests of Employees adversely affected by the Acquisition; and to provide for expedited changes in services, facilities, operations, seniority and existing collective bargaining agreements to enable the expanded railroad system created by the Acquisition to be operated in the most efficient manner, as one completely integrated railroad.

C. The RLA Collective Bargaining Agreement.

Before the execution of the Protective Agreement, as a result of negotiations entirely unrelated to the Acquisition, the Soo Line and IAM entered into a collective bargaining agreement (CBA) on March 1, 1985. The CBA was negotiated in accordance with the provisions of the RLA, which seeks among its aims to secure the "complete independence" of railroads and their employees in matters of self-organization to carry out the purposes of the RLA. *See* 45 U.S.C. § 151a. The CBA set out rules concerning working hours and conditions, layoffs, promotions, seniority, grievances and employee discipline. The CBA made no explicit mention of an employee's right of voluntary resignation.

D. The Voluntary Separation Plan.

Post-Acquisition, in December 1985, the Soo Line decided to reduce the number of employees on its payroll. It offered voluntary separation pay plans to certain em-

ployees represented by unions other than IAM. Under these plans, employees who voluntarily resigned would receive $15,000 cash in a lump-sum severance payment and, if they were age sixty or older, would have their health benefits continued until they were sixty-five. To take advantage of the plan, each employee was required to:

> Release all rights under labor protective conditions, including but not limited to, statutory, contract, or agreement labor protection and those conditions commonly referred to as Appendix B. * * * [R]esign and relinquish all rights of or claims to employment with the Soo Line Railroad * * * and release and discharge said railroad company, * * * from any and all claims of whatsoever kind and nature growing out of or in connection with said employment.

Soo Line Railroad Voluntary Separation Pay Plan at p. 3.

Many employees accepted the separation plan and terminated their services with the Soo Line. For example, on December 11, 1985, the Soo Line offered a voluntary separation pay plan to certain employees represented by the United Transportation Union (UTU). There were no negotiations with the UTU, and eighty-one UTU employees voluntarily participated in the plan. Likewise, January 31, 1986, the Soo Line offered to employees classified as "enginemen" represented by the UTU and the Brotherhood of Locomotive Engineers (BLE) a similar voluntary separation plan. Again, there were no negotiations with either of these unions and fifty-six BLE and UTU enginemen accepted the plan and terminated their services with the Soo Line.

In addition, numerous other Soo Line employees from ten different "old-line" labor unions (other than UTU and BLE) voluntarily requested and were granted sep-

aration pay plans. The Soo Line did not negotiate with either the employees or their unions regarding the plans. Neither the UTU, the BLE, nor any of the ten other unions even sought to negotiate with the Soo Line as to these voluntary plans, and at no time did these unions protest that offering the plans constituted a major dispute under the RLA. In all, nearly 400 union-represented employees accepted voluntary separation plans.

IAM learned of the program and questioned the Soo Line with respect to the applicability of the program to machinists. The Soo Line said it was not making such a plan available to the machinists. Thereafter, eight machinists, all over sixty years of age and with top seniority, contacted the Soo Line asking to participate in a similar plan. Of the eight, those who met certain additional qualifications, *see* 45 U.S.C. § 231a(a), were also eligible for retirement annuities under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 *et seq.* The eight machinists' requests were honored and, after signing the necessary releases, their services with the Soo Line were terminated. Each received a separation allowance of $15,000 and became eligible to continue to receive certain health benefits until age sixty-five.

E. The District Court Injunction.

When IAM learned that the separation plan was being offered to some of its members, it objected. In response to this objection, the Soo Line agreed to meet with IAM voluntarily and informally, in an effort to alleviate its concerns.[6] These discussions were unsuccessful. The Soo

[6] IAM asserts that these discussions were tantamount to formal negotiations, and by proceeding in formal negotiations, the Soo Line acknowledged that this was a subject of mandatory bargaining. In our view this misinterprets the record. In an affidavit, the Senior Vice President for Labor Relations and Personnel for the Soo Line stated that the discussions only occurred with the understanding that they were without prejudice to the Soo Line's rights to uni-

Line thereafter announced its intention to solicit other machinists' resignations pursuant to a voluntary separation plan (the Individual Plan), containing essentially the same terms as the agreements signed by other Soo Line employees. IAM then filed this action seeking to restrain the Soo Line from entering into the Individual Plan with individual machinists. IAM argued that the Individual Plan contravened the *New York Dock* conditions because its effect was to relieve the Soo Line of its obligations under those conditions. IAM contended that the eight senior machinists who voluntarily resigned would reduce by eight the number of employees who would have been furloughed as a result of the merger and thus would have been entitled to benefits under the *New York Dock* conditions. IAM claimed in effect that the early retirement program was an attempt to substitute a uniform lump-sum payment of $15,000 for payment for six years of service (or alternatively, $38,000) under the Protective Agreement.

The matter was submitted to the district court on affidavits, exhibits, and abbreviated oral testimony. The parties stipulated that the hearing on the preliminary injunction could be considered the hearing for a permanent injunction. The district court first looked to section 6 of the RLA and reasoned that it:

> establishes a comprehensive series of bargaining procedures, complete with detailed timetables and provisions for notice, to be followed by employers and bargaining representatives in effecting changes in rates of pay, rules, and working conditions. 45 U.S.C. 156. When employers wish to make changes in any regulated areas, the statute mandates written notice of the desired modification, after which con-

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laterally accept separation requests from machinists. Moreover, we know of no rule that requires the transformation of an issue into a major dispute under the RLA merely because discussions take place that could be characterized as "negotiations."

> ferences between management and labor take place, with the optional assistance of the National Mediation Board.

District Court Order at 3-4.

The district court then reviewed the cases which have defined the concededly hazy continuum between major and minor disputes and found that the dispute between the parties was major. It stated:

> [T]he Court is not called upon to review the status of either labor or management at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an inter-employment relationship, but the fundamental nature of the employment relationship itself.
>
> Both parties agree that there is no provision in the existing agreements between the Union and Soo Line allowing solicitation of individual union members or for individual lump-sum separation agreements. Under the *Elgin* definition and the decisions of the other courts which have faced the jurisdictional issue in the present context, this dispute is major, and this Court therefore has jurisdiction over it.

Id. at 6.

The court went on to hold that individual agreements such as the Individual Plan proposed by the Soo Line were impermissible, and enjoined the Soo Line from entering into the Individual Plan with employees represented by the Union until such time as the Soo Line complied with the notice, bargaining and mediation procedures of section 6 of the RLA, which have been called "almost interminable." *See Brotherhood of Maintenance*

of Way Employees v. Chicago and North Western Transportation Co., 827 F.2d 330, 333 (8th Cir. 1987).

II. DISCUSSION

In reviewing the district court's grant of a permanent injunction in this case, we note that appellate review of either a grant or denial of injunctive relief is confined to the familiar determination of whether the trial court abused its discretion. *See Olin Water Services v. Midland Research Laboratories, Inc.*, 774 F.2d 303, 307 (8th Cir. 1985). Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or it its decision relies on erroneous legal conclusions. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1102, 1104 (9th Cir. 1988). Whether a matter is a dispute under the RLA, and if so, whether it is a major dispute or a minor dispute, are both questions of law which we review *de novo*. *See Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1089 (9th Cir. 1988).

We are also well aware that our inquiry as to the probity of an injunction is limited to those issues directly related to the injunction, for "[a]n injunction does not settle a dispute—it simply disables one of the parties," *Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1854 (1987). With these parameters in mind, we proceed to examine the three issues in this case.

A. Existence of a Dispute.

We first examine the district court's conclusion that the disagreement at issue in this case is a dispute under the RLA. Section 2 of the RLA, 45 U.S.C. § 151a, provides that one of the purposes of the RLA is "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions."

The Soo Line argues that no "dispute," as that term is contemplated by the RLA, exists here; rather, the Soo Line characterizes the situation as one involving a matter of voluntary choice, personal to each employee. The Soo Line maintains that this case does not concern "rates of pay, rules, or working conditions," nor is an employee's right to resign derived from, dependent upon, or governed by a collective bargaining agreement. Simply put, the Soo Line argues that the RLA does not govern an employee's right to voluntarily separate from employment under terms advantageous to him. The district court concluded, however, that the Soo Line's offer of the Individual Plan to employees violated the RLA.[7] We disagree. Our examination reveals that the statutory language and case law allow the Soo Line to offer employees the Individual Plan in full compliance with the RLA.

As a starting point, the RLA itself appears to recognize an employee's right to terminate his employment relationship on terms he finds acceptable:

> Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

45 U.S.C. § 159 Eighth.

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[7] The district court's analysis of this issue is as follows:

> If these company/individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies.

District Court Order at 8.

The Supreme Court has also spoken on this issue. The Court has stated, simply, that certain individual employment contracts may exist side-by-side with a collective bargaining agreement. *See J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 339 (1944); *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944); *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2431-32 (1987). The principals set out in *J.I. Case* and its progeny are equally applicable to employees covered by the RLA and the National Labor Relations Act. *Order of Railroad Telegraphers*, 321 U.S. at 347.

At least one circuit court, the National Mediation Board, and the National Railroad Adjustment Board have condoned voluntary quits. *See Antonioli v. Lehigh Coal and Naviation Co.*, 451 F.2d 1171, 1175 (3d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Brotherhood of Railway Carmen of the United States and Canada v. Illinois Gulf Central Railroad*, National Mediation Board Case No. 6, Public Law Board No. 2603 (1980); *System Federation No. 69, Railway Employes' Dep't v. Florida East Coast Railway Co.*, National Adjustment Board Award No. 4733 (2d Div. 1965), slip op. at 30; *System Federation No. 2, Railway Employes' Dep't v. Missouri Pacific Railroad Co.*, National Railroad Adjustment Board Award No. 1579 (2d Div. 1952), slip op. at 4.

In sum, there is strong support for the Soo Line's position that no dispute under the RLA exists here. We are mindful, however, of the substantial case law, *see infra*, that has found the existence of a dispute under similar circumstances. We are also aware of the strong presumption of arbitrability in these types of cases, *see supra Ozark Air Lines*, 744 F.2d at 1350. Thus, we assume without deciding that the district court was correct in its conclusion that this case implicates a "dispute" under the RLA.

B. Major-Minor Dispute.

Proceeding on the assumption that this case does indeed present a dispute, we think the conclusion is inescapable that the dispute is minor.

The Supreme Court set out the difference between major and minor disputes under the RLA in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945):

> [I]t is clear from the [Railway Labor] Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.
>
> The first ["major" disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> *The second ["minor" dispute] class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.* The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Elgin, 325 U.S. at 722-23. (Footnotes omitted; emphasis added.) The Supreme Court went on to explain that major disputes involve "large issues about which strikes ordinarily arise" while minor disputes affect smaller differences which "arise incidentally in the course of an

employment" and are "of a detailed or individual quality." *Id.* at 723-24.

Section 3 of the RLA commits minor disputes over the "interpretation or application" of existing agreements and practices to the exclusive jurisdiction of Adjustment Boards, i.e., to "compulsory arbitration." 45 U.S.C. § 153 First (i); *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 39 (1957); *see Elgin*, 325 U.S. at 724. While the controversy is pending before the Board, the carrier may apply its reasonable interpretation of the disputed agreement, with limited exceptions not here relevant. *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986).

In deciding whether a dispute is major or minor, it is not our function to interpret or construe the language of the collectively bargained-for agreements between the parties (the CBA and Protective Agreement); rather, our function is to determine whether this case implicates a question of contract interpretation. *International Association of Machinists v. Northwest Airlines, Inc.*, No. 87-5235, slip op. at 6 (April 5, 1988). If the parties disagree whether the dispute can be resolved by reference to an agreement, the dispute is minor unless the claims of contractual justification are "frivolous" or "obviously insubstantial." *Maine Central Railroad Co. v. United Transportation Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 278-79 (7th Cir. 1981). This circuit has framed the test as follows:

> This Court has said that a dispute is minor if the agreement is "reasonably susceptible" of the interpretations sought by both the employer and the employees. Other courts have said that a dispute is minor if the employer's action can be arguably jus-

> tified under the terms of the existing agreement, or that the dispute is minor unless the employer's argument that its actions are within the contract is "obviously insubstantial." These locutions are essentially the same in their result. They illustrate the relatively light burden which the [Soo Line] must bear in showing that its actions are at most minor changes and thus within the status quo.

Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co., 802 F.2d 1016, 1022 (8th Cir. 1986) (citations omitted); *see also United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972). This rule is a necessary adjunct of the need to protect the arbitrator's exclusive jurisdiction over minor disputes and supports the additional corollary that "when in doubt, the courts constitute disputes as minor." *Brotherhood of Locomotive Engineers v. Atchison, Topeka and Santa Fe Railway Co.*, 768 F.2d 914, 920 (7th Cir. 1985).[8] Thus, in this case, if the bargained-for agreements arguably permit the practice, then the Soo Line may proceed unilaterally, subject to arbitration before the National Railroad Adjustment Board. *Brotherhood of Maintenance of Way*, 802 F.2d at 1021-22.

IAM contends that the disagreement over the Individual Plan is a major dispute. While both parties agree that the CBA does not authorize or prohibit this type of "voluntary quit" plan, IAM argues that the terms of the

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[8] We note by analogy that "[a]s a general rule, federal courts do not have jurisdiction over activity [that] is 'arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.'" *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)). Section 7 of the NLRA, 29 U.S.C. § 157, generally provides that employees have the right to join, or refrain from joining, unions. Section 8 of the NLRA, 29 U.S.C. § 158, generally defines unfair labor practices by both employers and unions.

Individual Plan are in direct conflict with the Protective Agreement. The Soo Line, on the other hand, contends that the Protective Agreement and the Individual Plan may coexist because the Individual Plan is entirely voluntary, results only in an employee's resignation, and does not unilaterally change the rules, working conditions or rates of pay for employees that choose to remain employed with the Soo Line.[9] According to the Soo Line, an employee has the right to terminate his employment at will on any terms he or she can obtain from the employer. The Soo Line also argues that the Individual Plan furthers this right and does not violate or undermine the CBA; therefore, it is a retained "management prerogative," and thus does not constitute direct dealing with employees in violation of the RLA.[10]

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[9] Both dissents assert that implementation of the Individual Plan will result in employee and work transfers, will affect seniority and bidding rights of other IAM members, and will probably deprive some employees of the opportunity to be separated under the terms of the Protective Agreement. We can find no support in the record for those predictions. In fact, in an affidavit, the General Chairman of IAM stated that any current or future furloughs, transfers, and work reductions resulted from the Acquisition, not the Individual Plan. Accordingly, under the broad definitions of "affected" or "displaced" employees in the Protective Agreement and *New York Dock* conditions, any employees furloughed or transferred would become eligible for benefits under the Protective Agreement and would in no way be harmed by the Individual Plan. As to seniority rights, any effect that the Individual Plan has will be positive, not negative, for if employees opt for the Individual Plan, the seniority of remaining Union members will be increased. Moreover, the presence of the Individual Plan will not deprive any employees of the opportunity to be separated under the terms of the Protective Agreement, for the simple reason that an employee who opts for the Individual Plan is not being deprived, but is making a free choice. An employee who decides against the Individual Plan remains as eligible as ever for the benefits of the Protective Agreement.

[10] Judge Heaney argues in dissent that by negotiating the Individual Plan, the Soo Line reduced its obligations under the Pro-

As we have noted, the touchstone of a major-minor dispute is whether a party's position is frivolous or clearly insubstantial. A number of tribunals have held that the very argument that the Soo Line sets forth here presents a minor dispute.

In *Chambers v. Burlington Northern, Inc.*, 692 F.2d 109 (10th Cir. 1982), the court examined a dispute arising out of an employee transfer. The defendant, Burlington Northern (BN), formed in a merger of several rail-

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tective Agreement, while benefitting select IAM members to the detriment of those members who would have otherwise qualified for benefits under the Protective Agreement. The dissent apparently finds fault with the Soo Line for trying to avoid the prospect of paying people to sit at home. In our view this argument downplays a key consideration, namely that the Individual Plan is completely voluntary. An employee who decides not to seek the Individual Plan remains as eligible as ever for benefits under the Protective Agreement, if affected by the Acquisition. Had the eight employees at issue been eligible for the greater benefits offered by the Protective Agreement, they would have opted for the Protective Agreement, entailing as it did benefits more than double those of the Individual Plan. These near-retirement employees had such vested seniority rights that it is dubious whether they would have been "affected" by the Acquisition. Thus the existence of the Individual Plan did not detract from rights that they otherwise had under the Protective Agreement, but rather, gave them rights which they otherwise could not have claimed under the Protective Agreement.

When one looks at the practicalities of the railroad seniority system, an ancillary reason for the Union's complaint becomes apparent. As a result of the Acquisition, the Protective Agreement required that those machinists with less seniority were furloughed first and were being paid a day's wages for not working; however, when the senior eight machinists quit and took the $15,000, the seniority of the junior machinists was increased by eight and some or all of them may have gone off furlough and back in service. The Union's efforts, which would result in the Soo Line's paying junior machinists to remain on furlough, hardly comports with the preamble in the Protective Agreement signed by the Soo Line and the Union to "provide for expedited changes" to allow operation of the Soo Line "in the most efficient manner."

ways in 1970, was required by the ICC to enter into a protective agreement, and accordingly executed a "Merger Protection Agreement" (MPA). The MPA and the merger were approved by the ICC.

Plaintiff Chambers was an engineer-fireman who was transferred. He executed a written agreement with BN in which he voluntarily relinquished his seniority in exchange for a lump-sum payment. *Chambers*, 692 F.2d at 110. When Chambers entered the agreement with BN he was subject to two collective bargaining agreements (CBAs), neither of which had provisions applicable to seniority or allowances on transfer.

Ten months after Chambers had signed his lump-sum agreement with BN, however, BN and the unions made new CBAs which gave a transferred employee both more money on transfer and provided that the transferred employee would retain his prior seniority. Chambers sued, arguing that BN had violated the MPA because his agreement with BN provided him less protection than was contained in the later CBA.

The court stated:

> [T]he question of forestalling and changing of obligations requires consideration, interpretation, and application of the MPA, the Union agreement in effect when the individual agreement was made, and the bargaining agreement made ten months after the individual agreement.

Chambers, 692 F.2d at 111. The court went on to hold that the dispute was minor and must be submitted to the exclusive jurisdiction of the National Railroad Adjustment Board, because "[i]n the final analysis, the dispute here relates to the interpretation and application of the MPA and the bargaining agreements." *Id.* at 112.

In *Clausen v. Burlington Northern, Inc.*, 106 LRRM 2496 (D. Mont. 1980), the district court faced an issue

similar to that in this case. Clausen was employed by BN as a fireman-engineer. The ICC required the implementation of a merger protective agreement (MPA), when BN was formed. The MPA provided protection for employees transferred by BN, but contained no provision for seniority adjustments on transfer.

Clausen and BN agreed that Clausen would accept a transfer. The agreement provided that Clausen would relinquish his prior seniority and reestablish it in the new location. Thereafter, BN and the Brotherhood of Locomotive Engineers negotiated a new collective bargaining agreement, which contained provisions covering benefits for transferred employees. The benefits in the new agreement exceeded those Clausen had received. Clausen filed suit, alleging that the individual agreement he negotiated with BN violated the RLA and the MPA, which incorporated the new collective bargaining agreement. The court held that the dispute was minor, stating at 106 LRRM 2499-2500:

> The fundamental conflict here is whether relevant sections of a Merger Protection Agreement apply to and permit the execution of individual contracts regarding seniority transfers. The plaintiff is attempting to avail himself of certain compensation provisions of the May 23, 1975, agreement between B.N. and UTU-E. Plaintiff also seeks restoration of his original seniority status and the difference between lump sum payments under his individual contract and the subsequent B.N.-UTU-E agreement. The plaintiff contends that § 6 of the MPA is violated by the individual contract negotiated with the defendant. * * * Therefore, plaintiff maintains that a collective agreement encompasses the issue in dispute and defendant contends that such agreement does not contemplate the specific controversy involved herein. Thus, the validity of the individual agreement negotiated by the parties necessarily requires

> interpretation and application of relevant provisions within the Merger Protection Agreement in effect at the time of the letter agreement negotiation. Interpretation and application of collective bargaining agreements within this context have consistently been deferred to the specialized expertise of the National Railway [sic] Adjustment Board.

In *International Association of Machinists and Aerospace Workers v. Illinois Central Gulf Railroad Co.*, 102 Lab. Cas. ¶ 11,345 (S.D. Ill. 1984), the district court examined a factual dispute similar to the one presented here. Illinois Central made individual agreements with furloughed employees for lump-sum payments in exchange for the individual employee's resignation, allegedly in violation of both a collective bargaining agreement and merger protective agreement. Illinois Central argued that the merger protective agreement, combined with past practices in which the unions acquiesced, gave Illinois Central the right to make the individual agreements. The union argued that no such past practices existed, and that any individual severance agreements were in derogation of the collective bargaining agreement.

After examining the record, the court held that Illinois Central's argument that there was a past practice of making individual severance agreements was not frivolous, nor was the union's argument that there was no such past practice.[11] In view of the fact that "a dispute

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[11] In this case, neither side makes any argument regarding past practice, or a lack thereof, with regard to the offering of lump-sum separation plans. Accordingly, past practices play no part in our decision. We note, however, that when employees of the Soo Line are injured they have the right to make claim and commence suit under the provisions of the Federal Employer's Liability Act (FELA). Soo Line has been negotiating settlement agreements with injured employees for over fifty years pursuant to the FELA, whereby an injured employee negotiates directly with the railroad to terminate his employment for consideration. These settlements have always been between the Soo Line's Claim Department or the

over the interpretation of rights under implied agreements based on past practices is a minor dispute, as long as both parties advance on interpretation that is not frivolous," *Railway Express Agency v. Brotherhood of Railway, Airline and Steamship Clerks*, 437 F.2d 388 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971), the court held the dispute to be minor and subject to mandatory arbitration. More importantly for our purposes, the court went on to state:

> Even if there were no past practice of making individual agreements, this matter should still be one subject to arbitration under the Merger Agreement which imposes protective conditions upon [Illinois Central]. The Merger Agreement has an arbitration clause and therefore any interpretation of the agreement is within the jurisdiction of the adjustment board. *See Illinois Central Railroad v. Wood*, Civil No. 69-107 (E.D. Ill. 1970). The severance agreements were made with protected employees, arguably in compliance with the Merger Agreement.

Thus the court, completely apart from the past practices argument, based its decision on the fact that the merger agreement had to be interpreted to resolve the dispute, because Illinois Central's actions arguably were in compliance with the Merger Agreement.

The major-minor dispute issue was most recently addressed in *Transportation-Communication Employees Union v. Grand Trunk Western Railroad Co.*, No. 87-74196 (E.D. Mich. Feb. 23, 1988). The union contended that management had violated the RLA and various bargained-for agreements, by engaging in direct negotiation with individual employees on the issue of separation agreements without consulting the union. The union sought an injunction prohibiting management from offer-

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Soo Line's Law Department and the employee (with or without an attorney), without any involvement by the labor organizations.

ing the individual separation plans. The court declined to assume jurisdiction, finding the dispute to be minor because "the individual separation agreements arguably are consistent with, and authorized by, the express terms of the * * * Protective Agreement." Slip op. at 9. The court also found not frivolous management's assertion that the union had agreed, through past practice, to the offering of the individual plans. Here as well the Individual Plan arguably is "consistent with, and authorized by," the Protective Agreement.

These cases stand for the proposition that the Soo Line's assertion (i.e, that the Individual Plan does not violate the CBA and Protective Agreement) is not frivolous. This is so for the simple reason that the overwhelming majority of courts to consider the identical or highly similar argument have reached one of two conclusions: either that the Soo Line's position is correct, or that the Soo Line's position is arguably correct and must be committed to binding arbitration. It is difficult to conceive how a legal position such as the Soo Line's, which has received such widespread judicial acceptance, could be deemed "frivolous" or "obviously insubstantial."

Accordingly, the Soo Line has met its "relatively light burden." *Brotherhood of Maintenance of Way*, 802 F.2d at 1022. We find this dispute to be minor and leave it to mandatory arbitration.

We are aware that two courts have concluded that individual lump-sum separation agreements may not coexist with pre-established collective agreements. *Brotherhood of Railway, Airline and Steamship Clerks v. Chesapeake and Ohio Railway Co.*, 115 LRRM 3635 (N.D. Ohio 1983); *Southern Pacific Transportation Co. v. Brotherhood of Railway, Airline and Steamship Clerks*, 636 F. Supp. 57 (D. Utah 1986). In concluding that the disputes were major, these courts found by necessity that management's arguments as to the propriety of its ac-

tions were frivolous or obviously insubstantial. As we have tried to show, there is substantial case law which has sustained, or at least found non-frivolous, arguments similar to those made by management in these two cases. Accordingly, to the extent these cases apply to the situation before us, we decline to follow them.

Moreover, we believe these two cases are distinguishable. The *Chesapeake and Ohio* clerks had "bolted" positions after three years of service, which meant lifetime job protection. The pertinent collective bargaining agreement in the *Southern Pacific* case was a BRAC agreement similar, in its high level of protection, to the agreements in *Chesapeake and Ohio.* By contrast, in this case the IAM machinists were never "bolted." In sum, the two cases are inapposite for the reason that their existing agreements provided a much higher level of protection for employees, thus in effect "closing the door" to a voluntary lump-sum separation plan, while the CBA and Protective Agreement in this case, by virtue of their silence on the subject, can coexist with a voluntary lump-sum separation plan.

C. Contractual Requirement of Arbitration.

There is another, equally persuasive reason why this case must go to arbitration rather than allowing the district court to vest status quo benefits in one of the parties while "disabling" the other party. The Protective Agreement provides in two places that "any dispute" over the "interpretation" or "application" of the *New York Dock* conditions (which are included as part of the Protective Agreement) *must* be resolved by binding arbitration before an expert railroad arbitration committee.[12] Thus, the Protective Agreement, read as a whole,

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[12] Article 1, § 11 of the *New York Dock* conditions provides: "In the event the railroad and its employees or their authorized representatives cannot settle *any* dispute or controversy with respect to the *interpretation, application or enforcement* of any pro-

is unambiguous in requiring that any disputes arising with regard to its interpretation or application must be submitted to binding arbitration.

In *Local No. 381, International Union of Operating Engineers v. Tosco Corp.*, 823 F.2d 265, 268 (8th Cir. 1987), this circuit, quoting from the recently decided *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986), held:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate * * * should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*"

(Emphasis added.) *Tosco*, again quoting from *AT&T Technologies*, went on to say that "[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is *not* to rule on the potential merits of the underlying claims * * * *even if it appears to the court to be frivolous* * * *." *Id.* at n.6. (Emphasis added.) In fact, the Supreme Court said in *AT&T Technologies*, 475 U.S. at 650, that where, as here, the arbitration clause refers broadly to any dispute over interpretation, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Moreover, as previously noted, this court has held that such

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vision [herein] * * *, it may be referred by either party to an arbitration committee." (Emphasis added.)

Section 8 of the Protective Agreement provides that "any dispute or controversy with respect to the interpretation [or] application * * * of this Agreement * * * may be referred by any party to an arbitration board [under] Article I, Section 11 of the *New York Dock* Conditions."

As noted previously, *see supra* n.4, such language has been held by this circuit to impose mandatory arbitration.

language as is present in the Protective Agreement mandates compulsory arbitration.

The present dispute clearly falls within the applicable arbitration clauses as a dispute over the "interpretation" of the Protective Agreement. The following three aspects of the Protective Agreement require interpretation to resolve this dispute: (1) the preamble of the Protective Agreement provides that it only applies to employees "adversely affected by the Acquisition;" thus the term "affected" must be interpreted to determine if the eight machinists at issue here were so affected; (2) the preamble of the Protective Agreement seeks as a goal the operation of the expanded railroad "in the most efficient manner," and this language must be interpreted to determine whether it comports with requiring the Soo Line to pay men to remain idle on furlough; and (3) the Protective Agreement as a whole must be examined to determine whether the absence of any language explicitly allowing or forbidding voluntary quits is more properly interpreted to allow or forbid such quits.

Stated more broadly, IAM's main argument is that the Protective Agreement bars the Individual Plan; accordingly, to properly address IAM's argument one must interpret the scope and meaning of the Protective Agreement, and the Protective Agreement states, not once but twice, that any dispute over its scope and meaning must go to binding arbitration. At a minimum, it certainly cannot be said "with positive assurance," as *Tosco* requires, that this is not a dispute over the interpretation of the Protective Agreement. The *New York Dock* conditions themselves contemplate the "retirement" or "resignation" of even those employees who are otherwise eligible for protective payments. Article I, § 6(d) *New York Dock* conditions.

In sum, *Tosco* and *AT&T Technologies* require a court to ask whether there is "positive assurance that the arbitration clause[s]"—which expressly cover disputes over

"interpretation"—are "not susceptible of an interpretation that covers the asserted dispute." As we have noted at some length, adjustment boards have held that voluntary individual separation agreements do not violate labor agreements or the RLA. Federal courts have reached the same conclusion or have concluded that similar issues must be arbitrated. Yet, IAM argues here that the Individual Plan violates both the Protective Agreement and the RLA. Resolution of this issue can only be had by examining and interpreting the Protective Agreement. Directly contrary to IAM's assertion, we think that the only response which can be set forth with "positive assurance" is that the arbitration clauses in this case are susceptible of an interpretation that covers the asserted dispute. Accordingly, the arbitration clauses must be given effect and allowed to operate over this dispute.[13]

In the final analysis, whether one relies upon the standard set out for distinguishing a major dispute from a minor dispute, or whether one relies upon the standard for determining whether arbitration clauses cover a dispute, the inquiry is essentially the same. That inquiry, in this case, is whether the Soo Line has set forth a position which is entitled to some credence. We conclude, in view of the cases which explicitly support the Soo Line's position, as well as the pertinent language of the agreements, which arguably support the Soo Line's position, that the Soo Line has more than met its burden under either inquiry.

III. CONCLUSION.

Although there is authority for the proposition that this case involves not a dispute, but rather, a choice personal to each employee, we rest our decision on the

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[13] Even apart from the arbitration clauses at issue, the RLA itself requires arbitration of the instant dispute. Section 3 of the RLA requires arbitration by expert adjustment boards of any dispute over the "interpretation or application" of railway labor agreements. 45 U.S.C. § 153 First.

grounds that this is a dispute which is suitable for arbitration, both because it is a minor dispute and because the parties agreed to arbitration; therefore, we hold that the district court lacked jurisdiction to issue the injunction in this case. Accordingly, the judgment of the district court is reversed, the injunction is dissolved, and the case is remanded for arbitration.

LAY, Chief Judge, with whom McMILLIAN, Circuit Judge, joins, dissenting.

I respectfully dissent.

The majority states the issue to be whether the existing collective bargaining and labor protective agreements cover the right of the railroad to enter into individual contracts with the employees. Slip op. at 12-13. However, it is undisputed that neither agreement covers this situation. The majority then posits the issue to be whether or not the labor protective agreement may be interpreted to conflict with the separate contracts entered into by individual employees. If this were the dispute involved, there would be no need to find that such a dispute is subject to arbitration under the labor protective agreement. If this indeed were the issue, then the discussion as to a minor dispute would be unnecessary because the issue would be conceded. But this is not the issue.

The fundamental question is whether the railroad has a unilateral right to enter into voluntary separation agreements with individual employees that significantly affect the rights of other employees.[1] Resolution of this

[1] As Judge Heaney stated in the original panel opinion:

> The impact on the union and its members of the voluntary separation plan will be significant. As a result of the individual agreements, work has been or will be transferred from one facility to another, seniority and bidding rights of some employees will inevitably be affected, and some employees will, in all probability, be deprived of the opportunity to be separated

issue does not require interpretation of either agreement. If the unilateral action of the carrier is not covered by the agreements, as the majority concedes in its opinion, then it is a misperception to argue that the issue involves interpretation of the agreements. The conduct here is an attempt by the railroad to negotiate with individual employees concerning "an intended change in agreements affecting rates of pay, rules, or working conditions * * *. 45 U.S.C. § 156. The obvious discussion of the definition of minor and major disputes cannot mask the fact that we are dealing with a matter that clearly is subject to mandatory bargaining under section 6 of the RLA.

The majority declines to follow the only two decisions which directly deal with the issue involved.[2] *Southern Pac. Transp. Co. v. Brotherhood of Ry., Airline and Steamship Clerks (So. Pac.)*, 636 F. Supp. 57 (D. Utah (1986); *Brotherhood of Ry., Airline and Steamship*

> under the terms of the labor protective agreement. Although the jobs of the remaining employees may be more secure after voluntary separation of some machinists, they would have also become more secure if employees were separated pursuant to the labor protective agreement.

International Ass'n of Machinists and Aerospace Workers, Dist. Lodge No. 19 v. Soo Line R.R., 833 F.2d 730, 734-35 (8th Cir. 1987).

[2] The union distinguishes the cases cited by the carrier and relied on by Judge Magill. In response to the petition for rehearing en banc the union states:

> The common issue in all these opinions is a challenge to the validity of an individual agreement by an individual employee who alleged that he or she was entitled to the benefits of a merger protective agreement. The courts held that a dispute about whether the agreement applied to these particular employees presented a minor dispute, subject to mandatory arbitration. None of these decisions purport to resolve the issue of the employer's duty to bargain about the terms of individual separation agreements.

Response to Petition for Rehearing at 8.

Clerks v. Chesapeake and Ohio Ry., 115 LRRM 3635 (N.D. Ohio 1983). In attempting to distinguish the decisions, the majority relies upon factual distinctions between the collective bargaining agreements and protective agreements in the instant case and those in the other two cases. Relying upon such differences merely obscures the actual issues involved. These two district court cases have not only rejected the majority's argument but have done so, as the majority has acknowledged, by explicitly stating that the argument is "frivolous or obviously insubstantial." Slip op. at 24.

In *So Pac.* a distinguished judge of the district of Utah stated:

> [Southern Pacific's (SP)] actions in negotiating individual separation agreements with its BRAC-represented employees circumvent the existing collective bargaining relations and practices between BRAC and SP, result in a diminution of SP's obligations in the collective bargaining scheme, disturb the status quo between the parties, and undermine BRAC's role as the duly certified representative. Further, SP's actions may cause confusion among SP's employees and disruption in the work force; introduce competition and discrimination that are upsetting to the structure of labor organization; and provide a leverage for taking away advantages under existing collective agreements. Without BRAC's involvement and approval, the terms of the individual agreements may not reflect the strength, bargaining power, and welfare of the employees as a group. Indeed, the practice and philosophy of collective bargaining look with suspicion upon individual agreements. *J.I. Case*, 321 U.S. at 338-39 * * *.

Southern Pacific, 636 F. Supp. at 58-59 (citation omitted).

The majority opinion is simply wrong. To allow this error to persist and become precedent under the RLA will be catastrophic. The effect of the opinion is to cast distrust on the fundamental mechanisms Congress has designed to maintain industrial peace under the Railway Labor Act. The district court should be affirmed in all respects.

HEANEY, Circuit Judge, dissenting, with whom LAY, Chief Judge, and McMILLIAM and ARNOLD, Circuit Judges, join.

I respectfully dissent. By negotiating the individual severance agreements at issue in this case, Soo Line is attempting to diminish its obligations under the existing collective bargaining agreement (which includes the Labor Protective Agreement) at the expense and to the direct detriment of those who would have qualified for benefits under the Labor Protective Agreement. Such a course of action is clearly prohibited under the RLA.

I

A comparison of the majority and panel opinions reveals that there is no dispute as to the relevant facts. Soo Line determined that as a result of a combination of economic factors and the merger of Soo Line and Milwaukee Railroad, Soo Line had more employees than it needed. Majority opinion at 6. Several hundred of these employees became "unnecessary" as a result of the acquisition. Pursuant to the Labor Protective Agreement, if Soo Line laid off employees and if the layoff resulted from the merger, it was required to pay those employees the equivalent of the wage earned at the time of the adverse action for six years, unless they chose to accept a lump sum payment (valued at about $38,000). Faced with this obligation, Soo Line unilaterally decided to offer voluntary separation pay plans to certain employees represented by unions other than the IAM. Under the plans, employees who entered into separation agreements would

receive $15,000 in severance pay and if they were older than sixty, would have their health and welfare benefits continued for a period of five years. To take advantage of the plans, employees were required to:

> Release all rights under labor protective conditions, including but not limited to, statutory, contract, or agreement labor protection and those conditions commonly referred to as Appendix B. * * * [R]esign and relinquish all rights of or claims to employment with the Soo Line Railroad * * * and release and discharge said railroad company, * * * parent or subsidiaries, from any and all claims of whatsoever kind and nature growing out of or in connection with said employment.

No negotiations were held with the unions representing these employees. Many employees accepted the separation plan and terminated their services with Soo Line. The IAM learned of the program and questioned Soo Line concerning the availability of the program to machinists. Soo Line said it was not available. Thereafter, eight machinists, all over sixty years of age, asked to participate in the severance plan. Soo Line honored their requests and, after signing the necessary releases, their services with the railroad were terminated. Each received a separation allowance of $15,000 and continued eligibility for certain benefits until age sixty-five.

When the IAM learned that the severance plan was being offered to some of its members, it objected. In response to the objection, Soo Line and the Union negotiated, in March and April of 1986, in an effort to reach an acceptable separation agreement. The negotiations were unsuccessful. At no time prior to or during the series of meetings between Soo Line and the IAM did Soo Line issue a notice pursuant to section 6 of the RLA, 45 U.S.C. § 156, triggering the dispute resolution procedures of the RLA. Soo Line thereafter announced its intention to solicit machinists pursuant to its own separation agreement containing essentially the same terms

as the agreements signed by other machinists. The IAM then filed this action seeking to restrain Soo Line from entering into separation agreements with individual machinists.

The matter was submitted to the district court on affidavits, exhibits, and abbreviated oral testimony. The parties stipulated that the hearing on the preliminary injunction could also serve as the hearing for a permanent injunction. The district court held that the dispute between the parties was a major one and enjoined Soo Line from entering into individual separation agreements with employees represented by the IAM until Soo Line complied with the notice and bargaining procedures of section 6 of the RLA, 45 U.S.C. § 156.

The above stated facts are clear that, by negotiating the individual severance agreements, Soo Line reduced its obligations under the Labor Protective Agreement and concurrently benefited select IAM members to the direct deteriment of those members who would have otherwise qualified for benefits under the Labor Protective Agreement. It did so despite the fact that the IAM negotiated the Labor Protective Agreement in keeping with the interests of all of its members. Moreover, Soo Line knew precisely what it was doing and why. It concedes as much in its petition for rehearing en banc when it states that by taking this action it "avoids the prospect of paying people to sit at home." Petition for Rehearing at 2.

Moreover, those who would have been furloughed under the Labor Protective Agreement but for the individual severance agreements are not the only IAM members affected. As a result of the individual agreements, both work and employees will, in all probability, be transferred from one facility to another and seniority and bidding rights of many IAM members affected. In this light, it is disingenuous to conclude that the individual agreements involved a matter of voluntary choice, per-

sonal to each employee. Majority Opinion at n.9. Rather, it is clear that as a result of the individual agreements, the "rates of pay, rules and working conditions" of the IAM members as a whole will be significantly affected.

II

The Supreme Court cases, which are binding upon this Court, are clear that contracts between employers and individual employees covered by collective agreements are suspect. In *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), the Court stated:

> [I]t is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group and that his freedom of contract must be respected on that account * * * but we find that the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. * * * We cannot except individual contracts generally from

> the operation of collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones.

321 U.S. at 338-39.

It is in light of the above quoted admonition that the Supreme Court set forth the rigorous standard applicable to an employer when it seeks to enter into an individual agreement with an employee who is covered under a collective bargaining agreement. It stated:

> We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice. But in so doing the employer may not incidentally exact or obtain any diminution of his own obligation or any increase of those employees in the matters covered by the collective agreement.

Id.; see also Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 345 (1944).

Thus, in view of the fact that Soo Line has, for all practical purposes, admitted it entered into the individual separation agreements in order to diminish its obligations under the Labor Protective Agreement, the practice here at issue is plainly prohibited by *J. I. Case*.

III

The majority erroneously asserts that:

> [T]he presence of the Individual Plan will not deprive any employees of the opportunity to be separated under the terms of the Protective Agreement, for the simple reason that an employee who opts for the Individual Plan is not being deprived, but is making a free choice. An employee who decides

> against the Individual Plan remains as eligible as ever for the benefits of the Protective Agreement.

Majority Opinion at n.9.

The vice in the individual agreements, however, is the significant effect they will have upon the collective agreement, and in particular the Labor Protective Agreement. Thus, the question whether the eight IAM members who entered into the individual agreements did so voluntarily or would have been affected by the acquisition is not relevant. The appropriate considerations are the effects of the acquisition and of the individual agreements on the IAM membership as a whole and on their collective rights under the Labor Protective Agreement.[1]

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[1] Thus, the majority's statement that the eight IAM members who took advantage of the Individual Plan would not have been affected by the acquisition and therefore would have been ineligible for benefits under the Protective Agreement simply misses the point. The crux of this dispute is:

> As a result of the Acquisition, the Protective Agreement required that those machinists with less seniority were furloughed first and were being paid a day's wages for not working; however, when the senior eight machinists quit and took the $15,000, [less than half the amount available to those who would have been furloughed under the Protective Agreement] the seniority of the junior machinists was increased by eight and some or all of them may have gone off furlough and back in service.

Majority Opinion at n.10.

The majority would apparently exempt Soo Line from the bargain it struck with the IAM in the Protective Agreement because it results in "the prospect of paying people to sit at home." *Id.* The majority would do so on the basis of the preamble to the Protective Agreement which lists among the general purposes of the agreement to "provide for expedited changes" so that Soo Line may operate "in the most efficient manner." *Id.*

Yet, even if the Protective Agreement could somehow be artfully construed to allow Soo Line to avoid specific provisions in it because they are "inefficient," such a highly interpretative process

In this regard, Soo Line did not argue below and does not argue here that it sought to reduce its complement of machinists due solely to economic conditions. It rather argues that, whatever the reason for the reduction, it has the right to seek voluntary retirements from the IAM members. The reason for this argument is clear. If Soo Line had not used the individual separation agreements as a means of avoiding the Labor Protective Agreement and had furloughed employees, it could have argued that some or all of the furloughs were unrelated to the merger, and if the Union disagreed, the dispute would have been subject to arbitration pursuant to the terms of the Labor Protective Agreement. But, Soo Line's obligations under the Labor Protective Agreement are not in dispute. Instead, the dispute centers on the question whether Soo Line may entirely ignore the Labor Protective Agreement and reduce its work force by individually negotiating less costly individual retirement agreements, or whether it must follow the seniority principles set forth in the collectively negotiated Protective Agreement and compensate laid-off employees pursuant to it.

IV

In light of the foregoing, it is not surprising that the case law relied upon by the majority offers no real support for its position. In *Caterpillar, Inc. v. Williams*, —— U.S. ——, 96 L.Ed.2d 318 (1977), the Supreme Court simply reiterated the view expressed in *J. I. Case* that individual contracts are valid "provided they are not inconsistent with an existing collective bargaining agreement." Yet, in this case the inconsistency is apparent and egregious.

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would not be appropriate unless and until Soo Line's obligations under the Protective Agreement are actually in dispute. Here, Soo Line simply seeks to avoid altogether its obligations under the Protective Agreement by offering selected employees the Individual Plan.

In *Antonioli v. Leigh Coal and Naviation Co.*, 451 F.2d 1171 (3d Cir. 1971), also relied upon by the majority, former railroad employees appealed the district court's denial of their claims. The claims were based on alleged non-compliance with an ICC protective order and requested allowances for furloughs and dismissals resulting from a merger. The employees' complaint set out three counts. What the majority overlooks is that the Third Circuit found counts I and II were barred by the applicable statute of limitations and count III was barred by the doctrine of res judicata. Thus, the language cited by the majority represents, at most, an alternative rationale to one of the statute of limitation holdings.

Moreover, the cases relied upon in *Antonioli* to support the alternative rationale simply hold that a *union* may enter into an agreement with a carrier that limits the rights of individual employees under a previously executed labor protective agreement. *See Roberts v. Lehigh & New England Railway Co.*, 211 F. Supp. 379 (E. D. Pa. 1962), *aff'd*, 323 F.2d 219 (3d Cir. 1963); *Clemens v. Central Railroad Co.*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Nemitz v. Norfolk and Western Railway Co.*, 436 F.2d 841 (6th Cir.), *aff'd*, 404 U.S. 37 (1971). Yet, the fact that a union may enter into such an agreement, does not mean that its individual members may do so as well. Rather, the individual agreements here at issue fall within the plain prohibition of *J. I. Case*. Thus, none of the decisions cited by the majority supports its decision that a union does not have the right to object to an employer offering retirement benefits to select members when acceptance of the offer will deprive other members of the union from furlough benefits previously agreed to by the employer and the union.

Finally, the majority asserts that, at best, this case presents a minor dispute to be resolved by the National Railroad Adjustment Board. The question whether the

Soo Line is free to negotiate individual separation agreements, however, does not involve interpretation of either the collective bargaining agreement or the Labor Protective Agreement. Instead, it involves an effort to recast these agreements by negotiating individually with parties bound by them. Therefore, Soo Line cannot meet its "relatively light burden" of showing that the dispute concerns the meaning or interpretation of the collective bargaining agreement or the Labor Protective Agreement. *See Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986).

The position taken by the district court—that this case does not present a minor dispute—is supported by the only two district court cases directly on point. *See Brotherhood of Railway, Airline & Steamship Clerks v. Chesapeake and Ohio Railway Co.*, 115 L.R.R.M. (BNA) 3635 (N.D. Ohio 1983); *Southern Pacific Transportation Co. v. Brotherhood of Railway, Airline & Steamship Clerks*, 636 F. Supp. 57 (D. Utah 1986). In contrast, the cases cited by the majority are simply not on point. In *Chambers v. Burlington Northern, Inc.*, 692 F.2d 109, 112 (10th Cir. 1982), the dispute involved a "claim by one employee that the railroad had not recognized seniority or paid the allowance to which he was entitled on transfer." *Id.* at 113. *Clausen v. Burlington Northern, Inc.*, 106 L.R.R.M. (BNA) 2496 (D. Mont. 1980), involved an individual transfer agreement under which the employee gave up his seniority for a lump sum payment of $15,000. (His move did not adversely affect any other employees.) *Thereafter*, the Union and the employer negotiated an agreement providing transferred employees with a $22,000 payment over three years and retention of seniority. The employee then sought to recover benefits under the newly negotiated agreement. The court held that the case presented a minor dispute for the Railway Adjustment Board. Thus, neither case presented the issue under consideration in this case.

The two cases cited by the majority which do consider disputes similar to this one simply do not help the majority's position. In those cases, the district courts found the employers' contentions—that past practice permitted individual agreements—were not frivolous. *See Transportation-Communication Employees Union v. Grand Trunk Western Railroad Co.*, No. 87-74196 (E.D. Mich. Feb. 23, 1988); *International Association of Machinists and Aerospace Workers v. Illinois Central Gulf Railroad Co.*, 102 Lab. Cas. (CCH) ¶ 11,345 (S.D. Ill. 1984). Here, the majority correctly recognizes that Soo Line did not claim that the Individual Agreements were authorized by past practice. Majority Opinion at n.11. Thus, the cases are simply inapposite. Moreover, in light of the applicable statutory authority and case law, it is simply erroneous to interpret the dicta in *Grand Trunk* and *Illinois Gulf Central* as indicating they would reach a similar result if no past practice had existed.

Stripped of its case law support, the majority is left to argue that the plain language of the Labor Protective Agreement requires arbitration. Yet, the plain language only states that any dispute over the "interpretation" or "application" must be resolved by binding arbitration. This case, however, does not present a dispute over interpretation or application of the Labor Protective Agreement. Soo Line simply seeks to ignore the agreement and to reduce its work force through an alternative technique which will diminish its clear obligations under the Labor Protective Agreement. It seeks to do so at the expense of those in the bargaining unit who would have otherwise been entitled to benefits previously bargained for by the IAM with the interests of all its members in mind. The Supreme Court recognized long ago in *J. I. Case* the impropriety of such conduct. This Court should do likewise.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5355

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE No. 19, an unincorcorporated labor organization,

Appellee,

v.

SOO LINE RAILROAD COMPANY, a Minnesota corporation,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

Submitted: May 14, 1987

Filed: November 12, 1987

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Judge, and MAGILL, Circuit Judge.

HEANEY, Circuit Judge.

The Soo Line Railroad Company (Soo Line) appeals from a decision of the United States District Court for the District of Minnesota enjoining the Soo Line from entering into separation agreements with individual members of the International Association of Machinists and Aerospace Workers, District Lodge No. 19, (Machinists' Union) in violation of the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, until such time as the Soo Line complies with the notice and bargaining procedures set forth in the RLA.

The Soo Line contends on appeal that the district court did not have jurisdiction over the subject matter of the dispute between the Soo Line and the Union for the reason that the dispute between them was not a major dispute subject to the mandatory bargaining procedures of the RLA, but was rather a matter personal to each employee and did not concern rates of pay, rules or working conditions. Alternatively, the Soo Line argues that if there is a dispute within the meaning of the RLA, it is a minor dispute subject to resolution by the National Railroad Adjustment Board. In our view, the findings of the district court are not clearly erroneous, and its legal conclusions are correct. We thus affirm.

FACTS

On February 19, 1985, the Soo Line acquired the core rail assets of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee). On January 1, 1986, the Milwaukee was merged into the Soo Line system. On September 10, 1985, the Soo Line entered into an employee protective agreement with the Machinists' Union. The preamble of the agreement states:

> The purpose of this agreement is to provide pursuant to 49 U.S.C. § 11347 of the Interstate Commerce Act, for joint and equitable arrangements *to protect the interest of Employees adversely affected by the acquisition*; and to *provide for expedited changes in*

> *services, facilities, operations, seniority and existing collective bargaining agreements* * * *. [Emphasis added.]

The agreement provides that existing collective bargaining agreements shall be preserved. It states that any employee of the merged railroad company laid off as a result of the acquisition of the Milwaukee is entitled to certain benefits from the Soo Line, including a severance allowance which, depending on the employee's length of service, could exceed $38,000.

In December, 1985, the Soo Line decided to reduce the number of employees on its payroll. It offered voluntary separation pay plans to certain employees represented by unions other than the Machinists' Union. Under this plan, employees who accepted separation would receive $15,000 in severance pay and, if they were older than 60, would have their health and welfare benefits continued for a period of five years. To take advantage of the plan, each employee was required to:

> Release all rights under labor protective conditions, including but not limited to, statutory, contract, or agreement labor protection and those conditions commonly referred to as Appendix B. * * * [R]esign and relinquish all rights of or claims to employment with the Soo Line Railroad * * * and release and discharge said railroad company, * * * parent or subsidiaries, from any and all claims of whatsoever kind and nature growing out of or in connection with said employment.

No negotiations were held with the unions representing these employees. Many employees accepted the separation plan and terminated their services with the Soo Line. The Machinists' Union learned of the program and questioned the Soo Line with respect to the applicability of the program to machinists. The Company said it was not applicable. Thereafter, eight machinists, all over sixty years of

age, contacted the Soo Line asking to participate in the severance plan. Their requests were honored and, after signing the necessary releases, their services with the railroad were terminated. Each received a separation allowance of $15,000 and became eligible to continue to receive certain health benefits until age sixty-five.

When the Machinists' Union learned that the severance plan was being offered to some of its members, it objected. In response to the objection, the Soo Line and the Union negotiated, in March and April of 1986, in an effort to reach an acceptable separation agreement. The negotiations were unsuccessful. At no time prior to or during the series of meetings between the Soo Line and the Machinists' Union did the Soo Line issue a notice pursuant to section 6 of the RLA, 45 U.S.C. § 156, triggering the dispute resolution procedures of the RLA. The Soo Line thereafter announced its intention to solicit machinists pursuant to its own separation agreement containing essentially the same terms as the agreements signed by other machinists. The Machinists Union then filed this action seeking to restrain the Soo Line from entering into separation agreements with individual machinists.

The matter was submitted to the district court on affidavits, exhibits, and abbreviated oral testimony. The parties stipulated that the hearing on the preliminary injunction could be considered as the hearing for a permanent injunction. The district court held that the dispute between the parties was a major one. It reasoned that section 6 of the RLA

> establishes a comprehensive series of bargaining procedures, complete with detailed timetables and provisions for notice, to be followed by employers and bargaining representatives in effecting changes in rates of pay, rules, and working conditions. 45 U.S.C. § 156. When employers wish to make changes in any regulated area, the statute mandates written

> notice of the desired modification, after which conferences between management and labor take place, with the optional assistance of the National Mediation Board.

It then reviewed the cases which have defined the difference between major and minor disputes and found that the dispute between the parties was major. It stated:

> [T]he Court is not called upon to review the status of either labor or management at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an interemployment relationship, but the fundamental nature of the employment relationship itself.
>
> Both parties agree that there is no provision in the existing agreements between the Union and Soo Line allowing solicitation of individual union members or for individual lump-sum separation agreements. Under the *Elgin* definition and the decisions of the other courts which have faced the jurisdictional issue in the present context, this dispute is major, and this Court therefore has jurisdiction over it.

The court then went on to hold that individual agreements such as those proposed by the Soo Line are impermissible. In reaching its decision, it relied on *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 322, 337 (1944), *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 345 (1944), and on two district court cases, *Brotherhood of Railway Airline Clerks and Steamship Clerks v. Chesapeake and Ohio Railway Co.*, 115 LRRM 3635 (N.D. Ohio 1983) (prohibiting negotiation of individual severance agreements), and *Southern Pacific Transportation Company v. Brother-*

hood of Railway, Airline and Steamship Clerks, 636 F. Supp. 57 (D. Utah 1986) (same). The district court stated that like the present case, both *C & O* and *Southern Pacific*

> involved individual severance agreements where bargained-for furlough programs were in place. Because the proposed individual agreements circumvented the union's involvement in an established subject of collective bargaining, and because this circumvention occurred in areas occupied by existing collective agreements, those courts found the railroads' conduct to be illegal.
>
> This Court sees no significant difference between those cases and the present one. If these company/individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies. [Citation omitted.]

Thus, the court held that injunctive relief is appropriate and enjoined the Soo Line from entering into individual separation agreements with employees represented by the Machinists' Union until such time as the Soo Line complies with the notice and bargaining procedures of section 6 of the RLA, 45 U.S.C. § 156.

ANALYSIS

The district court properly held that it had jurisdiction over the subject matter of the dispute. Under the RLA, the Soo Line has an obligation to bargain collectively with the Machinists' Union and to refrain from interferring with that Union's representation of its members. The United States Supreme Court decided in 1944 that

an employer may not, in most instances, use individual contracts to defeat the procedures prescribed by the National Labor Relations Act. It stated:

> [T]he individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supercede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.
>
> * * * We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining. But except as so provided, advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long range expense of the group as a whole.

J. I. Case Co. v. National Labor Relations Board, 321 U.S. at 338-339.

The principles enunciated in *J. I. Case Co.* are equally applicable to employees covered by the RLA rather than the National Labor Relations Act. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944). The precise evil identified in *J. I. Case Co.* is present here.[1] The Machinists' Union and the Soo Line have negotiated a labor protective agreement which specifically sets forth the benefits that employees who are laid off as a result of the merger are to receive.[2] These benefits exceed those available to employees who accept voluntary separation. It is obvious that the Soo Line will benefit if it can obtain agreements from employees to retire voluntarily and to waive their rights under the labor protective agreement signed by the company and

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[1] The Soo Line cites *Clausen v. Burlington Northern, Inc.*, 98 LRRM 2844 (D. Mont. 1978) in support of its action. We do not believe the case supports Soo Line's position. In that case the district court simply dismissed the plaintiff's complaint *without* prejudice for failure to allege that the employer's actions were inconsistent with the collective bargaining agreement.

[2] The Soo Line argues that an employee protective agreement signed by the parties is not a collective bargaining agreement within the purview of *J. I. Case Co.* and therefore the Soo Line can enter into voluntary separation agreements with individual employees even if the agreements are in derogation of the terms of the protective agreement. We disagree. Once a labor protective agreement is negotiated and signed by the employer and the union, it has the same status as the collective bargaining agreement it may modify. We do not read *Antonioli v. Lehigh Coal and Navigation*, 451 F.2d 1117 (3rd Cir. 1971) to hold to the contrary. Two of the three counts in the complaint were dismissed on statute of limitation grounds and the third count on res judicata or, alternatively, law of the case grounds. In note 15, the court states that an individual employee may waive his rights under a labor protective agreement for valid consideration. An employee may do so if the agreement between himself and the railroad company is not in derogation of the rights of others. No such claim was asserted in *Antonioli*.

the union. (It will pay those employees voluntarily separating from service less than it would pay those employees separating as a result of the merger under the labor protective agreement.) It is equally obvious that voluntary retirement under the company's terms is attractive to some employees. As might be expected, the eight machinists who initially accepted voluntary separation were older employees to whom separation was attractive. They were eligible for retirement benefits, were paid $15,000, and guaranteed continuation of their health benefits in exchange for, in effect, retiring a few years early. These employees were not necessarily those who would have been eligible to receive benefits under the labor protective agreement. The fact that the Soo Line and certain individual employees will benefit is not, however, sufficient, in and of itself, to find a violation of the RLA. The important thing is that these agreements have an adverse impact on the machinists as a group.

The impact on the union and its members of the voluntary separation plan will be significant. As a result of the individual agreements, work has been or will be transferred from one facility to another, seniority and bidding rights of some employees will inevitably be affected, and some employees will, in all probability, be deprived of the opportunity to be separated under the terms of the labor protective agreement. Although the jobs of the remaining employees may be more secure after voluntary separation of some machinists, they would have also become more secure if employees were separated pursuant to the labor protective agreement.

The Soo Line argues that some of the layoffs were unrelated to the merger and were caused by a decline in business activity. It points out that in these circumstances the employees laid off would not be eligible for any benefits under the labor protective agreement. This is true, but at least some of the employee layoffs were a result of the merger. The bottom line is that the union,

as the representative of all of the machinists, is entitled to balance the advantages and disadvantages of any proposed plan and to negotiate with respect to them. One thing is certain; every employee who accepts voluntary separation decreases the likelihood of the Soo Line being required to compensate an employee under the labor protective agreement.

The Soo Line and the Machinists' Union attempted to negotiate a new separation agreement, presumably an agreement to provide for the separation of certain employees and to establish separation allowances for affected employees. The agreement presumably would have applied to separations whether caused by loss of business or by virtue of the merger, but the parties were unable to reach an agreement. At this point, the Soo Line was requested to follow the procedures set forth in the RLA. *See* 45 U.S.C. § 156 (requiring 30-day notice of intended change in agreement). Instead, it proceeded unilaterally with its plan for a voluntary separation and in so doing, violated the clear and specific terms of the RLA. *See id.* ("carriers * * * shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions."); 45 U.S.C. § 152 seventh ("No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 156 of this title").

Alternatively, the Soo Line argues that if there is a labor dispute, it is a minor rather than a major dispute. The district court found to the contrary and we agree. The dispute does not involve interpretation of either the collective bargaining agreement or the labor protective agreement. It rather involves an effort on the part of the Soo Line to ignore both of these agreements and to negotiate individually with the employees on a matter which is a subject of mandatory bargaining. Therefore,

the Soo Line cannot meet its "relatively light burden" of showing that its action is at most a minor change in the agreements of the parties. *See Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986).

The judgment of the district court is affirmed.

MAGILL, Circuit Judge, dissenting.

I dissent. The majority holds that the district court properly had jurisdiction over what was a major dispute. I believe, however, that the events at issue here cannot be characterized as a dispute and thus are not subject to collective bargaining under the Railway Labor Act. Moreover, assuming *arguendo* that a dispute exists, I believe it is unquestionably a minor, rather than a major, dispute and thus was insufficient to vest the district court with jurisdiction, but rather, should have been submitted to binding arbitration.

This case has its genesis on February 19, 1985. On that date, the Soo Line acquired the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) from its trustee in bankruptcy.

On March 1, 1985, the Soo Line and the Machinists' Union (Union) entered into a collective bargaining agreement (CBA). The CBA was negotiated pursuant to the Railway Labor Act, and set out rules concerning working hours and conditions, layoffs, promotions and seniority, and grievances and discipline. The CBA made no mention whatsoever of an employee's voluntary resignation.

Pursuant to the acquisition of Milwaukee (Acquisition) the Soo Line entered into an employee protective agreement (Protective Agreement) with the Union on September 10, 1985. The Protective Agreement was required by 49 U.S.C. § 11343 *et seq.*, which mandates that conditions protective of labor be established when specified railroad transactions take place. As the preamble of the Protective Agreement states:

> The purpose of this agreement is to provide pursuant to 49 U.S.C. Section 11347 of the Interstate Commerce Act, as amended, and the Milwaukee Restructuring Act, for fair and equitable arrangements to protect the interests of Employees *adversely affected by the Acquisition*; and to provide for expedited changes in services, facilities, operations, seniority and existing collective bargaining agreements to enable the expanded railroad system created by the Acquisition to be operated in the most efficient manner, as one completely integrated railroad. (Emphasis added.)

As the majority opinion accurately summarizes, "[t]he agreement provides that existing collective bargaining agreements shall be preserved. It states that any employee of the merged railroad company *laid off as a result of the acquisition of the Milwaukee* is entitled to certain benefits from the Soo Line, including a severance allowance which, depending on the employee's length of service, could exceed $38,000." Slip op. at 2 (emphasis added). The majority later notes that the Protective Agreement "specifically sets forth the benefits that employees *who are laid off as a result of merger* are to receive." Slip op. at 7 (emphasis added). Thus, the majority appears to recognize two key aspects of the Protective Agreement: (1) that it only applies to employees who are "affected," or laid off, and (2) that it only applies if the layoff is the result of the Acquisition.

Despite this recognition, the majority then holds that the Protective Agreement bars employees, not found to be affected by the Acquisition, from voluntarily deciding to resign and from seeking the lump-sum separation agreement made available by the Soo Line (Individual Plan). Such an extrapolation of the Protective Agreement is unwarranted and unsupported.

The error in this regard began in the district court, which failed to make any findings as to whether or not the

eight Union members who sought the Individual Plan were affected by the Acquisition. Such a finding is essential in this case, because of the carefully circumscribed conditions necessary to trigger application of the Protective Agreement. From what I can discern of the district court's vague analysis, the court apparently concluded that any furlough or reduction in work force, whether specifically related to the Acquisition or not, would cause the Protective Agreement to apply.[1] Even a cursory reading of the Protective Agreement shows that such a sweeping interpretation is wrong. The majority, rather than correcting the district court's erroneous analysis, both accepts and compounds it. After noting the Soo Line's argument that some of the "layoffs" (as termed by the majority) were unrelated to the Acquisition, and accepting as true the proposition that in these circumstances, the "laid-off" employees could not benefit from the Protective Agreement, the majority then concludes that "at least some of the employee layoffs" were the result of the Acquisition. Slip op. at 9. This imprecise analysis is wrong in three respects. First, the employees at issue were not laid off but came forward voluntarily, seeking the Individual Plan.[2] Second, there was no finding in the district

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[1] The district court's analysis of this issue is as follows:

> If these company/individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies."

District Court at 8.

[2] Indeed, the instances in which the Soo Line offered the Individual Plan involved other unions and were not disputed. In this case, the Union employees who opted for the Individual Plan approached the Soo Line on their own accord. Thus I am skeptical of any argument that the Union employees at issue were affected by the Acquisition, because their position had been unchanged by

court that "some," or for that matter any, employees at issue were affected by the Acquisition. Third, assuming a finding that some employees were so affected, the Protective Agremeent would apply to only those employees but could not be used to bring within its scope employees to whom it clearly does not apply, namely, those employees who were not affected by the Acquisition.

I also reject the majority's conclusion that the CBA and the Protective Agreement prohibit the Individual Plan. The district court accepted that both the CBA and the Protective Agreement were silent on the issue of individual lump-sum separation agreements. District Court Order at 6. The majority concludes, however, that the issue of individual voluntary resignation, which is nowhere mentioned in either the CBA or the Protective Agreement, nonetheless falls within the scope of these agreements and qualifies under them as a major dispute.[3] I take issue with the majority's effort not only to fit a square peg into a round hole, but to remove the peg from its correct hole in order to do so. It seems clear to me that if an issue is not covered by an agreement, then the issue is simply not covered. The Individual Plan offered by the Soo Line has no conflicting effect on either the Protective Agreement or the CBA.

There is no effect on the Protective Agreement because of the accepted fact that the Protective Agreement makes no mention whatsoever of voluntary lump-sum separation plans. Thus the Protective Agremeent is inapplicable to this case, first because it applies only to employees affected by the Acquisition, and as I have noted, there were

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the Acquisition until they decided, for reasons personal to them, to approach the Soo Line seeking individual lump-sum separation agreements.

[3] Although the majority cites no case law, *see* slip op. at 7 n.2, I accept for purposes of this argument their contention that the Protective Agreement has the status of a collective bargaining agreement.

no findings that the eight Union employees at issue were so affected, and second, because even if these employees had been affected by the Acquisition, the Soo Line's actions in this case neither ran afoul of nor remotely approached any prohibition in the Protective Agreement. Similarly, the Individual Plan does not controvert the CBA. Of great importance in this regard are the statements of Mr. Jensen, counsel for the Union, speaking before the district court:

> I asked [Ms. Cathy Frankenberg, Director of Labor Relations for the Nonoperating Crafts with the Soo Line Railroad] whether or not there was anything that allowed what the Burlington or Soo Line was doing, whether there was anything in the collective bargaining agreement allowing it or prohibiting it, she said no. And I think that's true. * * * Rest assured *if there was something in the collective bargaining agreement or the protective agreement that the Soo Line was violating by entering into the separation agreements we would have grieved it* and we would have take[n] it to the Systems Board.

Hearing Transcript at 51 (emphasis added).

The majority next concludes that the presumed dispute is major, not minor, and thus requires mandatory bargaining. The majority notes that the dispute does not involve interpretation of either the CBA or the Protective Agreement. The majority then summarily concludes that the Soo Line is trying "to ignore both of these agreements and to negotiate individually with the employees on a matter which is a subject of mandatory bargaining." Slip Op. at 10. This statement presumes its own conclusion.

The Supreme Court set out the difference between major and minor disputes in *Elgin, J. & E. Railway Co. v. Burley*, 325 U.S. 711 (1945):

> [I]t is clear from the [Railway Labor] Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes or controversy.
>
> The first ["major" disputes] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> *The second* ["*minor*" *dispute*] *class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates* either to the meaning or proper application of a particular provision with reference to a specific situation or *to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement*, e.g., claims on account of personal injuries.

Elgin, 325 U.S. at 722-23 (citations omitted, emphasis added). The Supreme Court went on to explain that major disputes involve "large issues about which strikes ordinarily arise" while minor disputes represent individual disputes, "aris[ing] incidentally in the course of an employment" and are "of a detailed or individual quality." *Id.* at 724.

The district court, upon whose analysis the majority relies, found this dispute to be major because it did not require review of "the status of either labor or manage-

ment at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an inter-employment relationship, but the fundamental nature of the employment relationship itself." District Court Order at 6.

I believe, however, that under applicable law this issue, if at all a dispute, is a minor one. This dispute does not relate to "the formation of collective agreements or efforts to secure them." *Elgin*, 325 U.S. at 723. No one seeks to change the terms of the existing agreements or bring a new one into being; rather, as the testimony established, the CBA and the Protective Agreement simply do not cover this issue. This issue falls squarely within the definition of a minor dispute as an "omitted case," because it is founded upon an incident of the employment relation *independent of those covered by both the CBA and Protective Agreement.*

The message of *J.I. Case*, relied upon by the majority, is that individual employment contracts may exist side-by-side with a collective bargaining agreement. *J. I. Case*, 321 U.S. at 336-37. This message was repeated in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944): "Collective bargains need not and do not always settle or embrace every exception. It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits." This message was forcefully restated in *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425 (1987). The Court stated: "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective-bargaining agreement." The Court then noted that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, * * * so long as the contract relied upon is *not* a collective-bargaining agreement." *Caterpillar*,

107 S. Ct. at 2431-32. The Individual Plan at issue here can stand side-by-side with both the CBA and the Protective Agreement, because it is not covered by either agreement, nor does it detract from rights created by the two agreements. Rather, the Individual Plan represents the employees' assertion of their legal right to contract individually by seeking a retirement option available to them.

The district court and the majority both cite *Brotherhood of Railway, Airline and Steamship Clerks v. Chesapeake and Ohio Railway Co.*, 115 LRRM 3635 (N.D. Ohio 1983), and *Southern Pacific Transportation Co. v. Brotherhood of Railway, Airline and Steamship Clerks*, 636 F. Supp. 57 (D. Utah 1986), for the proposition that individual lump-sum separation agreements may not coexist with pre-established collective agreements. I believe these cases are inapposite. The *Chesapeake and Ohio* court found first that the voluntary separation plan violated the Railway Labor Act because it "would constitute individual agreements which subtract from the collective bargaining agreement and result in a diminution of defendant's obligation under the collective bargaining agreement." *Chesapeake and Ohio*, 115 LRRM at 3639. In that case, however, the applicable collective bargaining agreement contained specific employment protection provisions and furlough allowances that far exceeded any protection afforded to the machinists in this case under either the CBA or the Protective Agreement. During the hearing in the district court, the following interchange took place between counsel for the Soo Line and Ms. Frankenberg, Director of Labor Relations for the Nonoperating Crafts with the Soo Line:

> Q. What is the difference in the level of protection afforded the BRAC employees under the agreement with the C&O and the level of protection afforded the machinists under this current dispute?

A. In the BRAC agreement an employee who has performed three or more years of service with the C&O in the clerical craft—

THE COURT: Is employed for life?

THE WITNESS: And has a bolted position, has a life time protection to certain obligations that they must meet.

* * * *

THE WITNESS: And that can be differentiated from that protection which the machinists have because they have to be affective [sic] in order to be eligible for protection and the cap on that protection is six years.

Q. So basically after a certain period of time they [the *Chesapeake and Ohio* clerks] have lifetime protection.

A. The clerks [in the *Chesapeake and Ohio case*] do, yes.

Hearing Transcript at 41-42.

Another distinction is that unlike the BRAC agreement in the *Chesapeake and Ohio* case, here the major protection given to employees is limited to employees who can prove that they are "adversely affected" by the Acquisition. The Individual Plan thus does not subtract from the CBA as did the individual lump-sum separation agreements in *Chesapeake and Ohio*, nor is the Soo Line's obligation under the CBA or Protective Agreement diminished by the Individual Plan.

The *Southern Pacific* case, also relied on by the majority, appears to have adopted the rationale of *Chesapeake and Ohio*, *see Southern Pacific*, 636 F. Supp. at 59, and accordingly I do not find it to be any more persuasive authority.

In sum, the two cases are inapposite for the reason that their existing agreements provided a much higher level of

protection for employees, thus in effect "closing the door" to a voluntary lump-sum separation plan, while the CBA and Protective Agreement in this case, by virtue of their silence on the subject, can coexist with a voluntary lump-sum separation plan. Indeed, any language in the Protective Agreement which could be arguably construed as touching upon a voluntary lump-sum separation plan appears to allow such a plan. Section 9 of the Protective Agreement provides in part:

> Nothing in this agreement shall be construed as depriving any Employee of any rights or benefits * * * which such Employee may have under existing job security or other protective conditions or arrangements; provided, however, that if an Employee is eligible for protection under both this Agreement and some other * * * arrangements, such Employee shall elect between protection under this Agreement and protection under such other agreement.

Thus any interpretation of the Protective Agreement which concludes that it somehow cover a voluntary lump-sum separation plan must also conclude that such a plan does not violate, but rather, is contemplated by, the Protective Agreement.[4]

Contrary to the district court's and the majority's reliance on *Chesapeake and Ohio* and *Southern Pacific*, I find other cases more convincing. In *Chambers v. Burlington Northern, Inc.*, 692 F.2d 109 (10th Cir. 1982), an

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[4] This interpretation finds further support in section 8 of the Protective Agreement, which provides that if a dispute should arise with respect to the "interpretation, application or enforcement of any provisions of this [Protective] Agreement, it may be referred by any party to an arbitration board for resolution in accord with the provisions of Article I, Section 11 of the New York Dock Condition." The Eighth Circuit has concluded that this language imposes mandatory and binding arbitration of disputes. *Hoffman v. Missouri Pacific Railroad*, 806 F.2d 800, 801 (8th Cir. 1986).

employee protective agreement similar to the one at issue was entered into pursuant to a merger. The railroad and an emplyoee, however, had made an individual contract under which the employee relinquished seniority rights and accepted a transfer to another location in exchange for a lump-sum payment. The court affirmed dismissal of the complaint for lack of jurisdiction, on the ground that the plaintiff's claims raised "minor disputes for determination by the Adjustment Board, not the courts." *Chambers*, 692 F.2d at 112.

Similarly, in *Clausen v. Burlington Northern, Inc.*, 98 LRRM 2844 (D. Mont. 1978), an employee accepted an individual lump-sum payment in lieu of any benefits he might accrue pursuant to a merger protection agreement. The collective bargaining agreement in effect at the time had no provision applicable to seniority or transfer allowances. Contrary to the plaintiff's assertion that the existence of the collective bargaining relationship between the railroad and the Union precluded individual contracts, the court held that plaintiff's argument was "clearly faulty" under *J.I. Case* and failed to state a claim. *Clausen*, 98 LRRM at 2845-46. *See also Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171, 1175-76 (3d Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) ("The validity of these documents [lump-sum retirement agreements which waived rights under an ICC labor protection order] as evidencing a knowing and intelligent waiver of rights is established by this record. Therefore, plaintiff's claim must fall on the additional ground of the existence of a valid waiver of the asserted rights.").

Finally, the majority asserts that the Individual Plan has an adverse impact on the machinists as a group. In support, the majority states that seniority and bidding rights of some employees will inevitably be affected. Certainly seniority rights will be affected; however, the effect on existing Union members will be a positive, not a negative one. As a result of the demand made by these eight

machinists, all over sixty years old, for the Individual Plan, the seniority of remaining Union members will be increased. The majority further states that the Individual Plan may deprive some employees of the opportunity to be separated under the terms of the Protective Agreement. I do not follow this statment. Any employee who opts for the Individual Plan is not being deprived, but is making a free choice. An employee who decides against the Individual Plan remains as eligible as ever for the benefits of the Protective Agreement. The Individual Plan has no impact on the terms of and benefits offered by the Protective Agreement. It merely represents an alternative open to the free choice of the employees. The majority then concedes that the remaining employees will have greater job security after some machinists opt for the Individual Plan, but argues that this would also be the case if employees were separated pursuant to the Protective Agreement. That may be so, but it fails to show any adverse impact on remaining employees as a result of the Individual Plan.

In sum, because I believe the better-reasoned case law combined with common-sense analysis supports allowance of the Soo Line's Individual Plan, I think the district court did not have jurisdiction in this case. Accordingly, I dissent.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civil No. 4-86-353

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19

v.

SOO LINE RAILROAD COMPANY

[Filed Aug. 14, 1986]

ORDER

Roger A. Jensen, PETERSON, BELL, CONVERSE & JENSEN, 2100 American National Bank Building, St. Paul, Minnesota 55101, for plaintiff.

Patrick J. McPartland, Soo Line Railroad Company, P.O. Box 530, Minneapolis, Minnesota 55440, for defendant.

Plaintiff, International Association of Machinists and Aerospace Workers, District Lodge No. 19 (the "Union"), is before the Court seeking a permanent, "status quo," injunction to prevent defendant, Soo Line Railroad Company ("Soo Line" or "the Railroad") from entering

into separation agreements with individual union members. Plaintiff asserts these individual agreements to be in violation of the Railway Labor Act ("RLA"), 45 U.S.C. 150, [*sic*] *et seq.* For the reasons stated below, plaintiff's motion is granted.

Facts

In an effort to reduce the size of its work force, Soo Line in 1985, began offering certain employees lump-sum payments and insurance benefits in exchange for the employee's resignation and surrender of furlough and lay-off benefits. Initially, these separation agreements involved only employees represented by unions other than plaintiff. However, and according to the Railroad in response to requests from machinists, Soo Line offered separation agreements to employees represented by the plaintiff Union.

These efforts to reduce the numbers of employees took place in the context of pre-existing collective bargaining agreements: Soo Line maintains an agreement with the Union which defines the basic employer-employee relationship. In addition, in September, 1985, Soo Line entered into an agreement with the Union as an adjunct to its acquisition of Milwaukee Road. This agreement, called an "Employee Protective Agreement," among its terms delineated detailed procedures to be followed in the event that Soo Line engaged in reductions in the work force. The agreement prescribed structured cash and insurance benefits for furloughed employees.

Plaintiff objected to Soo Line's direct contract with its members. In response, the parties negotiated in March and April, 1986, in an effort to craft an acceptable separation agreement to be presented to the Union's members. Those negotiations were unsuccessful. Soo Line thereafter announced its intention to begin soliciting selected employees with its own final proposed separation agreement on April 28, 1986. This lawsuit followed.

In preliminary appearances before this Court, the parties agreed that pending this present decision, no employee termination/resignation agreements would be made.

Analysis

Plaintiff contends that defendant's entry into individual separation agreements with union members violates provisions of the RLA, and seeks a permanent injunction to prevent defendant from pursuing such agreements absent compliance with the notice and bargaining provisions of 45 U.S.C. 156. Defendant claims that this Court lacks jurisdiction over the case because the nature of the underlying dispute between the parties vests exclusive jurisdiction in the National Railroad Adjustment Board. 45 U.S.C. 152-154. Defendant then states that its activities are in compliance with the provisions of the RLA. Finally, defendant asserts that plaintiff has not demonstrated the necessity for injunctive relief.

The Court is therefore faced with three issues: a) its jurisdiction over this matter; b) the legality under the RLA of defendant's actions; and c) the need for injunctive relief.

a. Jurisdiction

The Court's jurisdiction over this dispute is determined by reference to the RLA. Specifically, Section 6 of the Act establishes a comprehensive series of bargaining procedures, complete with detailed timetables and provisions for notice, to be followed by employers and bargaining representatives in effecting changes in rates of pay, rules, and working conditions. 45 U.S.C. 156. When employers wish to make changes in any regulated areas, the statute mandates written notice of the desired modification, after which conferences between management and labor take place, with the optional assistance of the National Mediation Board.

The procedures set forth in Section 6 do not apply to railroad-employee disputes, however. Courts have focused

upon a distinction, implicit in Sections 2 through 4 of the RLA, between "major" and "minor" disputes. Rather than having all disputes subjected to the deliberately cumbersome negotiation procedures of Section 6, an established body of RLA precedent holds that lesser or "minor", disputes are the exclusive province of the National Railroad Adjustment Board. 45 U.S.C. 152-154. *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 356-57 (8th Cir. 1972); *United Transportation Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973). Defendant, claiming this is a minor dispute, argues that this Court is without jurisdiction to consider the present case and its requested injunction.

The distinction between major and minor disputes was elucidated by the Supreme Court in *Elgin, S. & E. Ry. Co. v. Burley*, 325 U.S. 711, 65 S.Ct. 1282 (1945).

> [I]t is clear from the [National Railway Labor] Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them, that Congress has drawn major lines of difference between the two classes of controversy.
>
> The first ["major" dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> The second ['minor" dispute] class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a

> particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries.

Id., 325 U.S. at 722-23, 65 S.Ct. at 1289-90 (citations omitted). The Supreme Court went on to explain that major disputes involve "large issues about which strikes ordinarily arise . . ." while minor disputes involve individual disputes, "aris[ing] incidentally from the course of an employment," "of a detailed or individual quality." *Id.*, 325 U.S. at 724, 65 S.Ct. at 1290.

This Supreme Court definition of major and minor disputes has been further explicated by subsequent cases. *Brotherhood of Railway, Airline, and Steamship Clerks v. Chesapeake & Ohio Ry.* (C-83-451 N.D.Ohio, Oct. 19, 1983) (hereinafter referred to as *C&O*), and *Southern Pacific v. Brotherhood of Railway, Airline, and Steamship Clerks*, 85-NC-0192W (N.D. Utah, Jan. 9, 1986) (hereinafter referred to as *Southern Pacific*). These cases involve situations astonishingly similar to that presented here. In each of these cases, a railroad sought to "expedite attrition" among its ranks by offering lump-sum payments to individuals represented by a labor union. In each case the court determined that the railroad's acts gave rise to a major dispute, thus conferring jurisdiction upon the Court. *C&O*, slip op. at 3-4, 5-6; *Southern Pacific*, slip op. at 7-8.

The Court finds, as did the courts in *C&O* and *Southern Pacific*, that this is a major dispute. This is because the Court is not called upon to review the status of either labor or management at the interstices of an agreement. Instead, the case presents fundamental issues of whether or not a person may even be an employee or a member of a union. We are not defining an interemployment relationship, but the fundamental nature of the employment relationship itself.

Both parties agree that there is no provision in the existing agreements between the Union and Soo Line allowing solicitation of individual union members or for individual lump-sum separation agreements. Under the *Elgin* definition and the decisions of the other courts which have faced the jurisdictional issue in the present context, this dispute is major, and this Court therefore has jurisdiction over it.

b. Defendant's conduct and the RLA

The Union argues that it is unlawful for the Railroad to negotiate with an individual employee when the employer is obligated to negotiate with the employee's bargaining representative on those same subjects. They further argue that since severance pay is a mandatory subject of bargaining, Soo Line may not enter into individual separation agreements. Defendant responds that it has an absolute right to enter into severance agreements with its employees, that it is not obligated to negotiate with the Union, and that individual agreements are not prohibited unless they directly contravene an existing agreement.

The Court declines to adopt defendant's argument. Established precedent holds that individual agreements such as those proposed by the Railroad are impermissible.

Earlier in this century the Supreme Court held that railroads may not enter into individual agreements concerning rates of pay and rules and conditions of employment in the face of collective bargaining agreements, and that individual agreements may not be relied upon by employers to circumvent the collective bargaining provisions of the RLA. *J.T. Case Co. v. National Labor Relations Board*, 321 U.S. 322, 337, 64 S.Ct. 576, 580 (1944); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 345, 64 S.Ct. 582, 584-85 (1944). Relying on these decisions, the *C&O* and *Southern Pacific* courts found such agreements in violation and in probable violation of the RLA, respectively. *C&O*, slip op. at 6;

Southern Pacific, slip op. at 7. Like the present case, both *C&O* and *Southern Pacific* involved individual severance agreements where bargained-for furlough programs were in place. Because the proposed individual agreements circumvented the union's involvement in an established subject of collective bargaining, and because this circumvention occurred in areas occupied by existing collective agreements, those courts found the railroads' conduct to be illegal. *Id.*

This Court sees no significant difference between those cases and the present one. If these company/individual agreements were to be allowed, the union would be denied the right of access to formal negotiation concerning compensation for severance; a right secured to it by Section 6. Further, these events occur in a setting in which an existing furlough plan is in place. Under these conditions, the Court finds that Soo Line's conduct violates the RLA and its underlying policies.

c. Injunction

Plaintiff comes before the Court seeking a "status quo" injunction, preventing defendant from entering into individual separation agreements without first going through the notice and bargaining requirements of Section 6 of the RLA, 45 U.S.C. 156. Therefore, the final issue which this Court must address is whether, given its jurisdiction over the matter and its conclusion that defendant's conduct in fact violates the RLA, a permanent injunction should issue.

Traditionally, permanent injunctions are appropriate only in extraordinary circumstances, as when irreparable injury has occurred or will result, or where conventional pecuniary relief will not address the injury experienced. *Beacon Theaters v. Westover*, 359 U.S. 500, 508-09, 79 S.Ct. 948, 955-56 (1959); *Petroleum Exploration v. Public Service Commission*, 304 U.S. 209, 217-19, 58 S.Ct. 834, 839-40 (1938)). This general analytical construct

is modified in the case of injunctions under the RLA. The Eighth Circuit Court of Appeals has held that, where courts are presented with a major dispute, injunctions may issue absent a showing of irreparable harm. *United Transportation Union v. Burlington Northern*, 458 F.2d 354, 357 (1972). In light of this holding by the Eighth Circuit, the Court does not address the question of whether or not past-occurring individual separation agreements may give rise to irreparable harm.

The Court further notes that both of the prior courts considering individual severance agreements under the RLA issued injunctions to prevent subsequent attempts to obtain individual agreements. The courts in both *C&O* and *Southern Pacific* concluded that injunctive relief was indicated when railroads entered into individual agreements in contravention of the RLA. *C&O*, slip op. at 3-4, 8; *Southern Pacific*, slip op. at 9.

Based upon this precedential background, this Court holds that it is appropriate to issue a permanent injunction at this time.[1] Plaintiff has established that defendant's actions violate the bargaining procedures mandated by Section 6 of the RLA, 45 U.S.C. 156, and is accordingly entitled to the protections afforded by that Statute. The only practical means of affording the Union this congressionally prescribed authority is through injunction.

Conclusion

The Court thus finds: a) the present dispute is a major dispute, as contemplated by the provisions of the RLA, b) the defendant is in violation of the notice and bargaining provisions of that Act, and c) a permanent injunction

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[1] Implicit in the negotiation rules of the NRA is the parties' engagement in good faith negotiation. There has, of course, been no suggestion that the past negotiations of the parties, while not yet fruitful, have not been conducted in good faith. Absent such a showing, this Court need not consider matters other than those set forth above.

should issue. Based upon these conclusions and the record herein, IT IS ORDERED that:

Defendant Soo Line Railroad Company is permanently enjoined from entering into individual separation agreements with employees represented by plaintiff International Association of Machinists and Aerospace Workers, District Lodge No. 19, until such time as defendant complies with the notice and bargaining procedures set forth in Section 6 of the Railroad Labor Act, 45 U.S.C. 156.

Dated: August 13, 1986

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5355MN

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19, an unincorporated labor organization,

Appellee,

vs.

SOO LINE RAILROAD COMPANY,
a Minnesota corporation,

Appellant.

Appeal from the United States District Court
for the District of Minnesota

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises it is hereby adjudged and decreed that the judgment of the district court is reversed, the injunction is dissolved and the case is remanded for arbitration.

June 22, 1988

Order entered in accordance with opinion.

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX E

STATUTES RELIED UPON

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts))

A. Section 2 First

45 U.S.C. § 152 First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

B. Section 2 Third

45 U.S.C. § 152 Third

Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

C. Section 2 Fourth

45 U.S.C. §152 Fourth

Employees shall have the right to organize and bargain collectively through representatives of their

own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to joint or remain members of any labor organization or to deduct from the wages of employees any dues, fees, asessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, asessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

D. Section 2 Eighth

45 U.S.C. § 152 Eighth

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the re-

quirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

E. Section 2 Ninth

45 U.S.C. § 152 Ninth:

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropraiate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing

shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carrier to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

F. Section 6 of the Railway Labor Act

45 U.S.C. § 156:

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences, without request for or proffer of the services of the Mediation Board.

Supreme Court, U.S.
FILED
JAN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-701

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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January 9, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. When the validity of a railroad's voluntary individual severance program turns on the interpretation of certain employee protective conditions imposed by the Interstate Commerce Commission ("ICC"), and those conditions contain an express mandatory arbitration clause, whether jurisdiction to render that interpretation lies in the district court or in an arbitration board subject to review by the ICC.

2. When the validity of such a program also turns on the interpretation of an employee protective agreement entered into pursuant to such ICC conditions and the railroad's interpretation is at least "arguable," whether jurisdiction to render that interpretation lies in the district court or in an arbitration board under the Railway Labor Act's "minor dispute" principles.

LIST OF PARTIES

The caption of the petition for certiorari properly lists all parties. Pursuant to Supreme Court Rule 28.1, respondent's parent companies, subsidiaries and affiliates are Soo Line Corporation, Canadian Pacific Limited, and Indiana Harbor Belt Terminal Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-701

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Soo Line Railroad Company ("Soo Line") submits this brief in opposition to the petition for certiorari.

PRELIMINARY STATEMENT

The question presented here is whether a court or an expert arbitration board has jurisdiction to decide whether the Soo Line's voluntary severance program—under which excess employees were permitted to retire or resign voluntarily in exchange for a lump sum severance payment—is authorized by, or at least not inconsistent with, certain standard employee protective condi-

tions previously imposed on the parties by the Interstate Commerce Commission ("ICC").

The union and the dissents below have fundamentally misunderstood that the Soo Line's primary position is that the ICC conditions *incorporate, and affirmatively authorize,* voluntary individual early retirements by senior employees as an alternative to involuntary furloughs of junior employees during a reduction in forces. If that interpretation of the ICC conditions is correct, then the "direct dealing" cases relied on by the union are irrelevant, for the Soo Line will have been acting pursuant to authority granted by the ICC, not unilaterally "bypassing" the union. It is true, to be sure, that the union and the dissent have a different reading of the conditions, which they view as implicitly forbidding such voluntary retirements. This case therefore poses the question whether jurisdiction to choose between the parties' conflicting interpretations of the ICC conditions lies in the district court, as the unions and dissents below assert, or with an expert arbitration board, as the Soo Line and Eighth Circuit majority believe. As we show below, overwhelming precedent supports the Soo Line and Eighth Circuit majority's view, based both on an express mandatory arbitration clause in the ICC conditions—an alternative holding by the Eighth Circuit that the IAM *never even mentions* in its petition—and on the "minor dispute" principles of the Railway Labor Act ("RLA"). Indeed *no* precedent supports the union's contrary position, and certiorari should therefore be denied.

Certiorari should be denied for the further reason that even if the ICC conditions did not affirmatively authorize the severance program and hence the union's "direct dealing" cases were applicable here, those cases support the Soo Line, not the IAM. It is settled under those cases that employers may enter into agreements directly with individual employees so long as those agreements are not in conflict with the employer-union agreement. As the

Eighth Circuit majority recognized, that question similarly depends upon a resolution of the parties' competing interpretations of the ICC-imposed conditions, which were incorporated into the parties' employee Protective Agreement, and again arbitration is the exclusive means to resolve that question of interpretation. We also show below that, in any event, the terms of individual separations are not a mandatory subject of collective bargaining.

Not only do the union's theories have no merit, thus, but there is no conflict among the courts on these points. Indeed, the principal other individual severance case relied upon by the IAM was decided in the *railroad's* favor. The courts have recognized, moreover, that disputes over individual severance programs must be resolved on a case-by-case basis. For these reasons, certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

1. *The ICC-imposed labor conditions and subsequent Protective Agreement.* In February, 1985, the Soo Line, under the auspices of the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-22, bought the railroad operations of the bankrupt Chicago, Milwaukee, St. Paul & Pacific Railroad Company (the "Milwaukee"). Pet. App. 3a. The Soo Line informed both the ICC and the federal reorganization court that several hundred employees would lose their jobs as a result of the consolidation. *Id.* at 6a. In this regard, the Restructuring Act required that the ICC impose labor protective conditions "at least as protective of the interests of employees as [those] required under section 11347" of the Interstate Commerce Act. *Id.* at 4a. Under § 11347 (and its predecessor § 5(2)(f)), the ICC has for many decades imposed a standard set of job security protections—called *New York Dock* protections—as a condition of its approval of hundreds of railroad sales, transfers, or abandonments.

Id. at 5a; see generally *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The ICC recommended, and the reorganization court agreed (with a few changes not relevant here), that those *New York Dock* protections be applied to the Milwaukee-Soo Line consolidation. Pet. App. 6a.

The *New York Dock* conditions (Eighth Cir. J.A. 123-30) provide, *inter alia*, (1) that if a protected employee is furloughed as a result of the sale, he or she must continue to be paid, generally for six years, the equivalent of the wage earned at the time of the furlough unless he or she chooses instead to take a one-time payment of up to a year's pay; (2) that an employee will lose his "protected" status in the event of his "retirement" or "resignation"; (3) that the railroad and unions must negotiate an "implementing agreement" incorporating the conditions and resolving seniority and contract rights; and (4) that mandatory and exclusive arbitration must be used to resolve "any dispute or controversy with respect to the interpretation, application or enforcement of any provision" of the conditions. Pet. App. 5a.

As required by the *New York Dock* conditions, the Soo Line and petitioner IAM, in September 1985, entered into the so-called "Protective Agreement." Pet. App. 7a; see Eighth Circuit J.A. 103-12.[1] The Protective Agreement both incorporated the *New York Dock* conditions and contained its own mandatory arbitration clause. *Id.* at 7a, 25a. It also established seniority rosters for use in determining, in the event of furloughs, the order in which employees would be furloughed and, in such an event, entitled to protective benefits under the conditions. *Id.* at 7a.

---

[1] Contrary to petitioner's assertion (p. 4) that the Protective Agreement was entered into because "[r]ail labor was dissatisfied with the [*New York Dock*] conditions," it in fact was mandated by *New York Dock* and incorporated the *New York Dock* conditions. Pet. App. 7a.

2. *The railroad's voluntary severance program.* Contrary to petitioner's suggestion (at 15) that voluntary severance agreements between railroads and individual employees are of recent vintage, they in fact date back at least to the early 1950's. Moreover, whenever they have been challenged by a union, they have consistently been upheld by arbitration boards. In *System Fed'n No. 2* v. *Missouri P. R.R.*, Award No. 1579 (NRAB 2d Div. 1952), the Board upheld such an agreement, holding "[w]e find nothing in the parties' agreement or in the Railway Labor Act that prohibits the making of the contract between [the employee] and the carrier." Individual severance agreements were also upheld over union challenges in, *e.g.*, *System Fed'n No. 69* v. *Florida East Coast Ry.*, Award No. 4733 (NRAB 2d Div. 1965) ("is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration"); *Burlington Northern, Inc.* v. *BRAC*, Award No. 16 (S.B.A. 1975); and *Brotherhood Railway Carmen* v. *Illinois Central Gulf R.R.*, Award No. 6 (NMB P.L. Bd. No. 2608 1980). Indeed § 9 Eighth of the RLA expressly preserves each individual employee's absolute right to leave a railroad's service. 45 U.S.C. § 159 Eighth.

In sum, the ICC was well aware, when it formulated *New York Dock* and other standard employee protective conditions, that railroad arbitrators had consistently read standard protective agreements to contemplate an individual employee's right to resign or retire in exchange for a severance allowance, as a permissible means for the railroads to reduce forces without needlessly incurring large protection obligations for employees sitting at home doing no work. As shown below, that view is reinforced by the language of the conditions, which expressly contemplate the termination of benefits in the event of an employee's "resignation" or "retirement."

By and large, unions have looked favorably on, and acquiesced in, the making of such individual severance agreements when job abolishments are impending. Such programs (1) permit senior employees nearing retirement age, who would like to retire early or who otherwise would have to relocate when their jobs are abolished, to instead retire from service in exchange for a lump-sum separation payment; (2) permit junior employees who would otherwise be furloughed and out of work (as a result of job bumping by senior workers) to continue to hold productive, paying jobs; and (3) permit the railroad to avoid paying relocation allowances to senior employees and paying protection allowances to junior workers for sitting at home.

In December 1985, in order to avoid those latter economic hardships to the railroad and to present these favorable opportunities voluntarily to both junior and senior employees, the Soo Line instituted precisely the kind of voluntary severance program widely employed in the industry and upheld by railroad arbitrators. Pet. App. 7a-8a. Under that program, the Soo Line offered senior employees $15,000 (plus continued health benefits to employees over 60) in exchange for their early retirement from service, thereby creating needed vacancies for junior employees who would otherwise be furloughed. *Id.* at 8a. The program was offered to members of 10 unions, not including petitioner IAM; none of these unions complained about the program (thus showing that they too viewed the program as consistent with the ICC-imposed conditions), and nearly 400 union-represented employees accepted the voluntary retirement offers. *Id.* at 8a-9a.

During the course of the program, eight IAM members over 60 years of age approached the Soo Line and asked to participate. *Id.* at 9a. Their requests were honored and they were paid $15,000 plus health bene-

fits in exchange for their early retirements. *Id.* Petitioner IAM thereupon filed suit. *Id.* at 9a-10a.[2]

3. *The decision below.* In courts below, the union argued that the severance program was an impermissible effort to escape what it saw as the Soo Line's obligations under the *New York Dock* conditions, as incorporated by the Protective Agreement. Pet. App. 10a. The union asserted that under *New York Dock*, a railroad seeking to reduce forces has no choice but to relocate senior employees to positions held by junior employees and then pay the furloughed junior employees full wages for up to six years for sitting at home. *Id.* at 10a, 27a. The Soo Line countered that it read *New York Dock* as allowing it to permit the senior employees to retire voluntarily in return for a severance allowance, thus avoiding the need to furlough junior employees and to pay them for sitting at home. *Id.* at 18a. As shown at page 15 below, the Soo Line cited various facts supporting that interpretation. The Soo Line also argued that, in any event, individual retirements are not a subject of mandatory bargaining. *Id.* at 13a.

The Eighth Circuit held, first, that "there was strong support for the Soo Line's position" that severance programs are not a subject of mandatory bargaining, because the Act expressly preserves an individual employee's "right to terminate his employment on terms he finds acceptable." *Id.* at 13a-14a. The court did not resolve that issue, however, because it found that, in any event, the dispute had to be arbitrated for two separate reasons. *Id.* at 14a. First, arbitration was found necessary because (1) disputes over the interpretation of railway

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[2] When the IAM objected, the carrier agreed to try to negotiate a settlement of the dispute, but, as petitioner now concedes (p. 8 n.2) and the Eighth Circuit recognized (Pet. App. 9a n.6), the Soo Line expressly did so "without prejudice to the carrier's right to unilaterally accept separation requests" in the event no agreement could be reached.

labor contracts are arbitrable "minor disputes" under the standards employed throughout the Circuits so long as the railroad's interpretation is at least "arguable" (*id.* at 15a-17a); (2) the question whether the severance program was "in direct conflict" with the ICC conditions, as incorporated by the Protective Agreement, required construing those conditions (*id.* at 18a); and (3) the Soo Line's interpretation of the ICC conditions as allowing individual severances is at least "arguable" (*id.* at 19a-25a). The court emphasized that because participation in the program was "completely voluntary," it could well be read by an arbitrator not to detract from the ICC conditions and Protective Agreement, either in terms of benefits or employee seniority. *Id.* at 18a-19a nn.9 & 10. The court also noted that numerous other courts had reached the same ultimate conclusion. *Id.* at 19a-24a.

The other, "equally persuasive" reason for requiring arbitration relied on by the Eighth Circuit—although nowhere even mentioned in the union's certiorari petition—was the express arbitration clause found in both the *New York Dock* conditions and the Protective Agreement. *Id.* at 25a. The Eighth Circuit (1) noted this Court's recent reaffirmation of the extremely heavy presumption of arbitrability under such clauses (*id.* at 26a); and (2) found that there are at least several provisions of the Protective Agreement and the *New York Dock* conditions that can be construed to allow such severance programs (*id.* at 27a). The court therefore dismissed the case for lack of subject matter jurisdiction and remanded for arbitration. *Id.* at 29a.

Judge Lay's dissent was based on the premises, mistaken in the Soo Line's view, that (1) "neither [the general IAM-Soo Line collective bargaining nor the special protective] agreement covers this situation," and (2) that any unauthorized direct dealing with employees automatically violates the mandatory bargaining provisions of the RLA. *Id.* at 29a-30a. Judge Heaney's dis-

sent was based on his personal interpretation of the ICC conditions and the Protective Agreement and his resulting conclusion that the individual retirements had "reduced [the Soo Line's] obligations under the Labor Protection Agreement." *Id.* at 34a-36a, 41a.

REASONS FOR DENYING THE WRIT

I. The Court Below Correctly Applied Well-Settled Law In Concluding That Arbitration Is Required Under An Express Arbitration Clause And Under The "Minor Dispute" Principles Of The Railway Labor Act

We show in this Part that this case was correctly decided by the Eighth Circuit on the basis of well-settled principles. In Parts A and B we show that the court of appeals correctly enunciated the settled rules for finding questions of "interpretation" to be arbitrable under both express arbitration clauses and the "minor dispute" principles of the Railway Labor Act. In Part C we show that the ICC conditions must be "interpreted" to decide whether, as the Soo Line contends, the ICC conditions and the Protective Agreement incorporating those conditions authorize the severances at issue, or whether, as the union claims, the conditions provide no such authority and the Soo Line is acting unilaterally. In Part D we show that the ICC conditions must also be "interpreted" to see whether, even if they do not authorize the severances, they at least do not prohibit them, in which case it was entirely proper, under long-standing precedent, for the Soo Line unilaterally to deal directly with the employees in question. We also show at note 10 below that the entire issue of individual resignations is in any event not a mandatory subject of collective bargaining.

A. *Arbitration Clause Principles.* In its petition, the IAM startlingly fails even to mention one of the independent grounds relied on by the Eighth Circuit for referring the case to arbitration—an express arbitration

clause covering the parties' dispute. As the court below noted (Pet. App. 25a-26a & n.12), both the ICC conditions themselves and the Protective Agreement, which incorporated the conditions, contain mandatory arbitration clauses covering "*any* dispute or controversy with respect to the *interpretation*, application or enforcement of *any* provision [herein] . . ." (emphasis added). As the court of appeals also noted, this Court has recently emphasized the overwhelming presumption in favor of arbitration where such clauses are found:

> "where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

AT&T Technologies, Inc. v. *CWA*, 475 U.S. 643, 650 (1986) (citation omitted), quoted at Pet. App. 26a. That is true "even if [the claim] appears to the court to be frivolous," for "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 649-50. As this Court has made clear, moreover, those principles "are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy*." 475 U.S. at 648, citing *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Giving proper effect to the express arbitration clause found in ICC-imposed protective conditions, like the *New York Dock* conditions at issue in the case, is particularly essential, for it is through review of such arbitrations that the ICC ensures that its conditions are being interpreted and applied correctly. As the D.C. Circuit recently held, arbitrators interpreting and applying ICC-

imposed protective conditions are acting pursuant to authority delegated by the ICC. *IBEW* v. *ICC*, No. 87-1629, 1988 U.S. App. LEXIS 15954 (D.C. Cir. 1988). The court there accordingly affirmed the ICC's prerogative to review such arbitration awards in order to ensure that they comport to the ICC's intentions and statutory mandate. *Id.* Moreover, the D.C. Circuit has also held that these arbitration awards involving ICC-imposed conditions are ultimately reviewable in the court of appeals, and not in the district court. *UTU* v. *Norfolk & W. Ry.*, 822 F.2d 1114 (D.C. Cir. 1987).

Indeed, the Sixth Circuit recently emphasized that "every federal court which has interpreted § 11 of the New York Dock Conditions has concluded that arbitration is mandatory under that provision." *Atkins* v. *Louisville & N. R.R.*, 819 F.2d 644, 647-48 (6th Cir. 1987), citing, *inter alia*, *Walsh* v. *United States*, 723 F.2d 570, 574 (7th Cir. 1983); and *Hoffman* v. *Missouri P. R.R.*, 806 F.2d 800, 801 (8th Cir. 1986).

In sum, where any dispute arises involving the meaning or application of ICC-imposed protective conditions, that dispute must be resolved by arbitration, not a district court, both under standard arbitration clause principles and in order to preserve the ICC's jurisdiction over its delegated authority.

B. *Minor Dispute Principles.* Even where a case does not involve ICC-imposed conditions or an express arbitration clause, disputes over the "interpretation or application" of railroad-union agreements are still subject to mandatory and binding arbitration as a matter of law under § 3 of the Railway Labor Act, 45 U.S.C. § 153. As originally explained by this Court in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 722-27 (1945), railway labor disputes fall into two classes. So-called "major disputes" involve a change in or a "clear departure from" the existing railroad-union agreement, while "minor disputes" involve controversies over the "interpretation or

application" of the existing railroad-union agreement. *Id.*; see also Pet. App. 15a-16a. If the dispute is major, the railroad's action is subject to being enjoined until the parties have exhausted the Act's procedures for changing agreements. See, *e.g.*, *BRT* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). If the dispute is minor, by contrast, the dispute must be referred to an expert arbitration board to determine whether the railroad's action accords with the collective agreement. See, *e.g.*, *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972).

Where there is a dispute as to whether a railroad's action accords or conflicts with the applicable agreement, the dispute is deemed to be "minor" so long as the agreement is "reasonably susceptible" of the railroad's interpretation. Pet. App. 16a-17a. Put otherwise, "the dispute is minor unless the [railroad's] claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" *Id.* That test for distinguishing between major and minor disputes not only is not in conflict, but indeed has been adopted by *all 10* of the courts of appeals to have passed on the issue.[3] Thus courts do not encroach on the statutory province of the arbitrator to resolve any arguable controversy over the meaning or application of labor contracts. *Id.* at 17a.[4]

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[3] See *Maine Central R.R.* v. *UTU*, 787 F.2d 780, 782 (1st Cir. 1986); *ALPA* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983); *RLEA* v. *Consolidated Rail Corp.*, 845 F.2d 1187, 1190-91 (3d Cir. 1988); *Dement* v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988); *APFA* v. *American Airlines, Inc.*, 843 F.2d 209, 212 (5th Cir. 1988); *Division No. 1, Detroit, BLE* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *C&NW Transp. Co.* v. *RLEA*, 855 F.2d 1277, 1282 (7th Cir. 1988); *IAM* v. *Soo Line R.R.*, 850 F.2d 368, 376-77 (8th Cir. 1988) (en banc); *BLE* v. *Burlington N. R.R.*, 838 F.2d 1087, 1091 (9th Cir. 1988); *Southern Ry.* v. *BLFE*, 384 F.2d 323, 327 (D.C. Cir. 1967).

[4] That standard is compelled not only by the general heavy preference for arbitration of labor disputes, see *Gateway Coal Co.* v.

C. *Arbitration as to Whether the ICC Conditions Authorize Voluntary Individual Severances.* In each of the cases involving individual severance programs litigated to date, the union has claimed—as the IAM does here—that the program constituted unilateral "direct dealing" that violated the union's statutory right as exclusive bargaining agent. Every court considering that claim has agreed (1) that individual severances are lawful, and do not constitute unilateral "direct dealing," if they are authorized by the railroad-union agreement, either expressly or impliedly; and (2) that any dispute as to whether the railroad-union agreement, properly interpreted, authorizes such severances is subject to mandatory and binding arbitration. In *BRAC* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988); *IAM* v. *Illinois Central Gulf R.R.*, 102 Lab. Cas. ¶ 11,345 (S.D. Ill. 1984); and *BRAC* v. *Norfolk Southern Ry.*, No. 87-3137 (D.D.C. 1988), the courts held that arbitration was needed to decide whether the railroad's "past practice" evidence showed an implied agreement between the railroad and union authorizing individual resignations. In *TCU* v. *Grand Trunk W. R.R.*, 679 F. Supp. 696 (E.D. Mich. 1988), and *BRC* v. *Atchison, T. & S.F. Ry.*, CA 3-88-0089-T (N.D. Tex. 1988), *appeal pending*, No. 88-7012 (5th Cir.), the courts held that arbitration was required on the basis of the need to interpret both "past practice" evidence of an implied agreement and the express terms of the parties' written agreement, which—*as in this case*—recognized the possibility of an employee's "resignation" or "retirement." The *Atchison* and

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United Mine Workers, 414 U.S. 368, 381 (1974), but also by the particular need for expert arbitration of disputes over the meaning of railway labor contracts. See, *e.g.*, *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978) (Congress considered it "essential" that minor disputes be kept "within the Adjustment Board and out of the courts"); *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, 566 (1946) ("Congress thus designated an agency [the adjustment board] peculiarly competent to handle" such disputes).

Norfolk Southern courts held that arbitration was compelled by the RLA's "minor dispute" rules; the *Illinois Central* and *Grand Trunk* courts found it to be obligatory under both the RLA's minor dispute principles and express arbitration clauses in the relevant railroad-union agreements.[5]

It is the Soo Line's position here that, properly interpreted, the *New York Dock* protective conditions and the Protective Agreement, which incorporated those conditions, affirmatively authorize the Soo Line to accept voluntary individual retirements. As noted above, the Restructuring Act required the ICC to impose a set of employee protective conditions, and the ICC imposed *New York Dock* conditions. It is well-settled that when the ICC imposes such conditions, their terms are binding on both the railroad and the union, and indeed may not even be changed by a subsequent railroad-union collective bargaining agreement that substantially abrogated rights of employees protected under the ICC conditions. See *Norfolk & W. R.R.* v. *Nemitz*, 404 U.S. 37 (1971). The *New York Dock* conditions, moreover, required the Soo Line and the union to enter into a so-called "implementing agreement," and the resultant Protective Agreement incorporated the terms of the *New York Dock* conditions, as the court below noted (Pet. App. 7a). In result, the terms of the *New York Dock* conditions are controlling with respect to employee protections between the Soo Line, the IAM, and its members.

As noted above, the IAM construes those *New York Dock* conditions as precluding voluntary resignations and instead requiring senior employees to relocate and bump junior employees, who end up being furloughed and being

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[5] The courts in *BRAC* v. *Chesapeake & O. Ry.*, 115 L.R.R.M. 3635 (N.D. Ohio 1983); and *Southern Pacific Transp. Co.* v. *BRAC*, 636 F. Supp. 57 (D. Utah 1986), enjoined individual severance programs only after finding that there was no past practice or written agreement evidence that might be interpreted as allowing such severances.

paid full wages for up to six years for sitting at home. In other words, the union believes that *New York Dock* benefits are not simply a shield for employees in the unhappy event that they are furloughed, but instead a sword that gives them an entitlement to be furloughed and to sit at home with full pay for up to six years. The Soo Line, by contrast, believes that the *New York Dock* conditions both expressly and impliedly authorize individual voluntary severances as an alternative, under which senior employees whose only right would be to continued work are permitted early retirement, while junior employees are kept on productive jobs. The Soo Line reaches that interpretation because (1) the conditions expressly state that their benefits do not apply in the event of an employee's "resignation" or "retirement"; (2) the conditions also provide more generally that their goal is to permit operation of the railroad "in the most efficient manner," which is inconsistent with paying people for sitting at home when others are willing to retire (Pet. App. 27a); (3) § 9 Eighth of the RLA expressly preserves an individual employee's right to separate from service, individual severances have thus been part of industry practice for many years (see page 5 *supra*), and it is reasonable to infer that the ICC incorporated that practice into the *New York Dock* conditions; and (4) no other union objected to the individual severance program, thereby evidencing their agreement with the Soo Line's interpretation (Pet. App. 8a-9a).[6]

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[6] In the district court, the Soo Line argued that the dispute was subject to mandatory arbitration and outside the district court's subject-matter jurisdiction, but only relied on the absence of any conflict between the severance program and the relevant agreements. In the court of appeals, however, the Soo Line clearly advanced the position that the *New York Dock* conditions contemplate and affirmatively authorize the individual severances. See, *e.g.*, Rehearing Petition pp. 1 ("these ICC conditions [] allow the offer of voluntary early retirement incentives"); 7 ("*New York Dock* conditions themselves expressly contemplate employee 'retirement[s]' and 'resignation[s]'"); 11 ("the conditions themselves contemplate the 'retire-

In sum, this case involves a dispute as to whether *New York Dock* conditions, both standing alone and as incorporated into the Protective Agreement, are properly interpreted as authorizing individual severances. As shown above, that interpretation is subject to arbitration, not the district court's jurisdiction, for two reasons. First, it goes to arbitration under the express arbitration clauses, in order to preserve the ICC's jurisdiction to review the award and ensure that it comports to the ICC's original intent in imposing the *New York Dock* conditions. Pet. App. 25a-28a. Second, it goes to arbitration as a "minor dispute" over the interpretation of the Protective Agreement, since the Soo Line's position is at the very least "arguable." Pet. App. 15a-25a. Accordingly, Judge Heaney erred in basing his dissent on his own personal interpretation of the *New York Dock* conditions, a task reserved exclusively to the arbitration board.[7] And Judge Lay went astray because he failed even to recognize the Soo Line's position that the *New York Dock* conditions authorize the railroad to accept voluntary retirement requests. For these reasons, and because there is no dispute as to these legal principles and no contrary decisions, certiorari should be denied.

Finally, contrary to the IAM's claim (pp. 22, 25), requiring arbitration (which IAM admits (p. 24) is standard practice in these cases) will not "deprive[] the IAM of a forum in which to enforce the statute's principle of exclusive representation." If the arbitration board finds that the individual severances are barred by *New York*

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ment' or 'resignation'" of employees); 14 (listing factors supporting this interpretation of *New York Dock*). Of course, this case in any event involves the question of subject matter jurisdiction and the interpretation of conditions imposed as a matter of law by the ICC, and hence no objection can be raised—nor has it been—that the Soo Line's position was not raised in the district court.

[7] As this Court held in *Union Pacific R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978), Congress considered it "essential" to keep these questions of interpretation "out of the courts."

Dock, and the Soo Line nonetheless persists, the union will be able to go into court either to enforce the award or for an injunction under the RLA. If, on the other hand, the arbitration board decides in the Soo Line's favor, then the IAM's claim here will be answered, for the railroad will have shown that it has not illegally bypassed the union, but instead has union's (and the ICC's) concurrence. In sum, arbitration will preserve the arbitrator's and ICC's proper roles in interpreting ICC conditions and still preserve the union's claims concerning its statutory rights; hence Judge Lay's fear of the result as "catastrophic" (Pet. App. 32a) is plainly misplaced.

D. *Arbitration as to Whether the ICC Conditions Do Not Conflict With Voluntary Individual Severances.* Even if the *New York Dock* conditions did not affirmatively authorize the severances, arbitration is still necessary to decide whether the severances are at least "not inconsistent" with the *New York Dock* conditions. As the Eighth Circuit said:

> "The [Supreme] Court has stated, simply, that certain individual employment contracts may exist side by side with a collective bargaining agreement. *See J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 339 (1944); *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347 (1944); *Caterpillar Inc. v. Williams*, 107 S. Ct. 2425, 2431-32 (1987)." Pet. App. 14a.

In *J.I. Case*, this Court held that it knew "of nothing to prevent the employee's, because he is an employee, making any contract provided that it is not inconsistent with a collective agreement . . . ." 321 U.S. at 339. That rule was expressly made applicable to the Railway Labor Act in *Order of Railroad Telegraphers*. 321 U.S. at 347. Indeed, as petitioner expressly concedes, there are at most only two limitations under *J.I. Case*: (1) that the individual contract not constitute "a waiver of any benefit to which the [individual] employee otherwise would be

entitled to under the trade agreement," and (2) that the individual contracts "may not be availed of to defeat or delay the procedures . . . looking to collective bargaining." Pet. 16-17, *quoting* 321 U.S. at 337-38.

Similarly, as the court below noted, *J.I. Case* was reaffirmed in 1987 in *Caterpillar Inc.*, where this Court reiterated that "*J.I. Case* does not stand for the proposition that all individual employment contracts are subsumed into, or eliminated by, the collective bargaining agreement," and that "individual employment contracts are not inevitably superseded by any subsequent collective agreement . . . ." 107 S. Ct. at 2431-32.

Applying *J.I. Case*, lower federal courts have recognized the validity under the RLA of individual contracts that are not in conflict with the railroad-union agreement. See, *e.g.*, *Chambers* v. *Burlington Northern, Inc.*, 692 F.2d 109, 111 (10th Cir. 1982) (individual agreement providing lump sum payment for relinquishment of seniority and acceptance of transfer); *Clausen* v. *Burlington Northern, Inc.*, 98 L.R.R.M. 2844 (D. Mont. 1978) (same); *Antonioli* v. *Lehigh Coal & Nav. Co.*, 451 F.2d 1171, 1175 (3d Cir. 1971) (individual retirement agreements for employees over age 65). See also *Cummings* v. *National R.R. Passenger Corp. (Amtrak)*, 523 A.2d 338, 343 (Pa. 1987) (finding that the individual agreements at issue were "separate from the collective bargaining agreement"), *cert. denied*, 56 U.S.L.W. 3246 (1987). In result, as the court held in the *Grand Trunk* individual resignation case, "[i]ndividual contracts, particularly individual offers and acceptances of retirement or resignation, *are* lawful . . . if they are not inconsistent with" the applicable agreement between the parties. 679 F. Supp. at 699.

In short, the "direct dealing" cases relied on by the IAM—*J.I. Case*, *Railway Express*, and *Medo Photo*—simply lead to the test articulated by the Eighth Circuit

below: that an individual agreement not authorized by the union-railroad contract is still lawful so long as it does not violate or undermine that collective bargaining contract. The IAM's efforts to recast that test (p. 21) are therefore simply without merit.

It is clear that, in order to decide whether the individual retirements at issue here are lawful or not under the "direct dealing" cases, arbitration is required. As noted above, the first test under *J.I. Case* is whether the retirements conflict with the *New York Dock* conditions, that is, whether the severances effect a diminution of the Soo Line's obligations to the affected employees. That, in turn, can be resolved only by construing the *New York Dock* conditions to decide whether, as the IAM claims, they give junior workers a vested right to be furloughed and sit at home or, as the Soo Line believes, they contemplate voluntary retirements of working senior employees in order to avoid such inefficiencies. Accordingly, arbitration is required to resolve the first *J.I. Case* test, and Judge Heaney in dissent was therefore wrong to try to resolve the disputed interpretation himself. The second *J.I. Case* test is easily met by the severance program, for it clearly does not "defeat or delay" collective bargaining. The union is absolutely free, anytime it wants, to serve upon the Soo Line a bargaining proposal under § 6 of the RLA.[8] Accordingly, the IAM can establish that the program is unlawful under *J.I. Case* only if it prevails in arbitration on its claim that the individual severances are incompatible with the *New York Dock* conditions, and hence the Eighth Circuit correctly held that the district court had no jurisdiction.

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[8] As noted below, it is the Soo Line's view that this matter is not a mandatory subject of bargaining; but assuming for purposes of this section that bargaining is mandatory, the IAM is free to commence it immediately.

II. The Decision Below Is Not In Conflict With Any Other Decisions

Petitioner asserts two conflicts justifying review by this Court, but neither in fact exists. The IAM claims first that the decision below conflicts with *J.I. Case* and its progeny as to the permissible scope of "direct dealing" through individual agreements. As shown at page 13-17 above, however, those cases are wholly inapposite here, for it is the Soo Line's position that the *New York Dock* conditions, and their incorporation into the Protective Agreement, gave the railroad full authority for the making of individual severance agreements, and the dispute over that question of interpretation is subject to mandatory arbitration. Moreover, as shown on pages 17-19 above, the decision below in fact fully accords with this Court's "direct dealing" cases, since it applied the proper standard, correctly holding that the lawfulness of the individual severances depends on whether they are in conflict with the *New York Dock* conditions, and remands for arbitration to decide that question. Indeed, *no* court has ever held to the contrary, *i.e.*, *no* court has held that individual voluntary severances by employees covered by *New York Dock* conditions conflict with those conditions or constitute unlawful direct dealing under *J.I. Case.*

The IAM's other claimed conflict is with the Seventh Circuit's holding with respect to another railroad's indivdual severance program in *BRAC* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403 (7th Cir. 1988). As noted above, however, that case was decided in favor of the *railroad*, and hence the IAM is claiming a conflict between two cases, both of which the unions *lost.* As shown at pages 13-14 above, moreover, the Eighth Circuit's decision in this case is not in conflict with the Seventh Circuit's decision or with any other individual severance case. Indeed the Seventh Circuit, like the Eighth Circuit below, held that the union's challenge was subject to mandatory

arbitration as a "minor dispute."[9] It did so because there was nonfrivolous past practice evidence of an implied agreement between the railroad and the union authorizing individual severances. 847 F.2d at 406-08. Similarly here, as shown at pages 14-15 above, there is substantial evidence that the *New York Dock* conditions affirmatively authorize, and at least do not conflict with, the individual retirements. In fact, because in this case there is an express arbitration clause, the court below correctly observed that it cannot even get into the business of deciding whether the Soo Line's interpretation is arguable. See page 10 *supra*.

In sum, neither IAM nor the dissents below could point to any direct conflict with the majority's decision, and the IAM's effort to generate a conflict with the general "direct dealing" principles developed in *J.I. Case* is wholly unavailing.[10] Finally, as shown at pages 16-17

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[9] Apparently the collective agreement there (unlike the ICC conditions here) had no express arbitration clause; hence the Seventh Circuit relied solely on the "minor dispute" rationale.

[10] Not only is there no conflict on these issues, but the decision below is also supported by the point that the terms of individual voluntary severances are not a mandatory subject of bargaining. As noted above, the Eighth Circuit held that there is "strong support" for this position, but found it unnecessary to resolve the issue. Pet. App. 12a-14a. Under §§ 2 First and 6 of the RLA, 45 U.S.C. §§ 152 First and 156, mandatory bargaining duties extend only to "rates of pay, rules, and working conditions" of employees. See also *Japan Air Lines Co.* v. *IAM*, 538 F.2d 46, 51-52 (2d Cir. 1976). And under 1 Fifth of the RLA, the term "employee" is limited to persons presently "in the service of a carrier . . . ." 45 U.S.C. § 151 Fifth.

In the present case, voluntary prior retirement was a condition to being paid the severance allowance. See Eighth Circuit J.A. 14-17. In *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157 (1971), this Court held that contracts between a company and individual retirees, who agreed to withdraw from a collectively-bargaining insurance plan, did not involve or affect "employees" and hence did not constitute a mandatory subject of bargaining.

above, the IAM's claim that the decision below leaves it remediless is simply untrue. Indeed the unions, represented by the same counsel here, advanced this very same argument—that arbitration denies them a forum for their statutory claims—with respect to the Seventh Circuit's recent holding that the lawfulness under the RLA of a line sale and accompanying furloughs was subject to mandatory arbitration, but this Court denied certiorari. See *Chicago & N.W. Transp. Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3376 (1988).

Because the eight IAM members at issue left service prior to receiving their allowances, the size of those allowances was not a mandatory subject of bargaining.

That conclusion is reinforced by § 9 Eighth of the RLA, which expressly does not "require an individual to render labor or service without his consent, nor . . . make the quitting of his labor or service by an individual employee an illegal act . . . ." 45 U.S.C. § 159 Eighth. As the National Railroad Adjustment Board stated in *System Fed'n No. 69, supra*, it "is indisputable that an employee has an absolute right to resign from his job; it seems to be a logical extension of this concept to go further and conclude that an employee has the right to resign in exchange for a monetary consideration." Because the severances here are *entirely voluntary*, thus, they are not a mandatory subject of bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 19,
Petitioner,

v.

SOO LINE RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

On January 9, 1989 respondent Soo Line Railroad Company [hereinafter, "Soo"] served its brief in opposition to a petition by the International Association of Machinists and Aerospace Workers, District Lodge No. 19 [hereinafter, "IAM"], asking this Court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the sharply divided *en banc* decision of that court in *IAM v. Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988). Respondent Soo's brief in opposition raises several arguments to which petitioner submits a reply should be made. Therefore, petitioner

IAM respectfully submits this reply brief pursuant to Rule 22.5 of the Rules of this Court.

I. Contrary To The Soo Line's Eleventh Hour Argument, This Case Does Not Present Any Issue Concerning The Authority Of The Interstate Commerce Commission To Authorize A Railroad, Over The Objection Of The Employees' Duly Designated Representative, To Bargain Directly With Represented Employees

In its brief in opposition to this petition, respondent Soo asserts that both the IAM and the dissenting portion of the *en banc* Eighth Circuit have "fundamentally misunderstood" the Soo's "primary position" which is that "the ICC conditions *incorporate, and affirmatively authorize,* voluntary individual early retirements by senior employees as an alternative to involuntary furloughs of junior employees during a reduction in forces." Soo's Brief in Opp. at 2 (emphasis in original). That argument, which was raised by the Soo for the first time when it filed its petition with the Eighth Circuit for rehearing, is wrong both factually and legally.

Throughout this litigation, until it asked the full Eighth Circuit to hear its appeal *en banc*, respondent Soo asserted that the "separation program [which it was offering over the IAM's objection] . . . is outside the scope of any labor agreement with the IAM, [including the Employee Protective Agreement, and] is an additional benefit afforded to IAM employees . . . ." Joint Appendix in 8th Cir. No. 86-5355 [hereinafter, "J.A."] at 34. However, in its petition asking the Eighth Circuit to rehear the adverse decision by a panel of that appellate court, respondent Soo suddenly discovered that its direct dealing with IAM represented employees was "authorized" by the employee protective conditions which, it asserted, had been imposed by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] under 49 U.S.C. § 11347. Petition For Rehearing served December 7, 1987, at 1. Respondent repeats that argument

here and states that the *ICC imposed* the employee protective conditions upon which it is now relying and that those conditions override any restriction which the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, might have placed on its ability to bargain directly with employees over the IAM's objections. Soo's Brief in Opp. at 14.

Contrary to respondent Soo's assertion (Soo's Brief in Opp. at 3, 14), the ICC did not impose employee protective conditions upon the Soo's acquisition of the operating properties of the Chicago, Milwaukee, St. Paul & Pacific Railroad [hereinafter, "MILW"] in February 1985, and consequently, respondent is wrong in looking to the ICC's authority to justify its disregard of its Railway Labor Act obligations. Rather, Section 5(b)(1) of the Milwaukee Railroad Restructuring Act of 1979 [hereinafter, "MRRA"], Pub. L. No. 96-101, 93 Stat. 736, 738, 45 U.S.C. § 904(b)(1), specifically placed the obligation upon the MILW Reorganization Court to impose the appropriate employee protections. Section 5(b)(1) provides in pertinent part that:

> [T]he bankruptcy court may authorize the sale or transfer of a line of the Milwaukee Railroad to be used in continued rail operations, subject to the approval of the Commission under paragraph (2) of this subsection. *In authorizing any such sale or transfer, the court shall provide a fair arrangement at least as protective of the interest of employees as that required under section 11347 of title 49 of the United States Code.*

45 U.S.C. § 904(b)(1) (emphasis added).

When the Soo's application to acquire the MILW was before the ICC, the Commission was also considering an application by another railroad (the Chicago & North Western Transportation Company) to acquire the MILW, and although the Commission concluded that the Soo's

application was consistent with the public interest and approved that application, it also concluded that the North Western's application was consistent with the public interest and it approved that application as well. Both applications were approved with the understanding that the reorganization court would choose which of the two competing bids to acquire the MILW should be accepted, although, at the court's request, the ICC stated that it preferred the Soo's application. As relevant here, the ICC also recommended that the reorganization court impose the *New York Dock* conditions as the appropriate protections for employees, regardless of which application the court accepted. *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 318-20, 328 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 2460 (1987). When the sale proposal came before the reorganization court in February 1985, the court approved the Soo's application pursuant to Section 5(b) of the MRRA, but rejected the ICC's recommendation that it impose the *New York Dock* conditions. Instead, the court accepted the "recommendation" of the Trustee, as seconded by the Soo, and imposed what are known as the "Appendix B" conditions;[1] as the court explained:

> I have looked over the recommendation of the Interstate Commerce Commission [recommending that

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[1] Respondent Soo is correct in asserting that the Appendix B conditions are comparable to the ICC's standard *New York Dock* employee protective conditions (Soo's Brief in Opp. at 4), but there are several crucial differences between the two forms of protective conditions. In particular, the Appendix B conditions did not prohibit the Soo and MILW from consummating the sale before they reached agreements with rail labor applying the general protections to this specific sale, and the Appendix B conditions applied to this sale only, rather than to any action taken pursuant to the court's order, as would have been the case if the *New York Dock* conditions had been imposed.

> the *New York Dock* conditions be imposed]. I can't say it is arbitrary or capricious but, on the other hand, I think it is advisory. In my opinion, the procedure that has been used by the Trustee in the other abandonments, particularly Appendix B to Order 406, or the master's recommendation, is the preferred one in this case. . . . I also find that they are equally protective of labor's interest as required by Section 11343 [*sic*] of the Interstate Commerce Act.

Transcript of Court's Ruling at 31-32, February 8, 1985, *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, N.D. Ill. No. 77 B 8999, *aff'd* 799 F.2d 317 (7th Cir. 1986).

As we explained before (Pet. at 4),[2] rail labor was dissatisfied with the Appendix B conditions and it accordingly noted an appeal from the reorganization court's order to the United States Court of Appeals for the Seventh Circuit. *See, In re Chicago, Milwaukee, St. Paul & Pac. R.R., supra,* 799 F.2d at 328-32. Moreover, while that appeal was pending, respondent Soo entered into collective bargaining agreements with most of its unions, including the IAM, to "replace" the Appendix B conditions. J.A. at 111. Those agreements, which are now called the "Employee Protective Agreements" (J.A. at 103), adopted the monetary benefits of the ICC's *New York Dock* conditions (J.A. at 105), but, as important

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[2] Respondent Soo asserts that the Employee Protective Agreement was entered into pursuant to Article I, Section 4 of the Appendix B conditions which required the parties to enter into "implementing agreements." Soo's Brief in Opp. at 4 n.1. That assertion is totally wrong, for an "implementing agreement" under the ICC imposed conditions is to apply the general terms of the ICC conditions to the facts of the particular transaction and to provide the basis upon which to select and assign the forces to perform the consolidated work. *New York Dock Ry.—Control*, 360 I.C.C. 60, 85, *aff'd* 609 F.2d 83 (2d Cir. 1979). Here, the Employee Protective Agreements "replaced" the Appendix B conditions and substantially modified those conditions; no "implementing agreement" may alter the substantive levels of the *New York Dock* conditions as did the Employee Protective Agreements.

here, those agreements did not carry with them any immunity from the Railway Labor Act's requirement that a rail carrier bargain with the duly designated representative of the employees, and with "no other." *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 548 (1937).

Since the Soo-IAM Employee Protective Agreement is a collective bargaining agreement which, at best from the Soo's point of view, traces its origin to the authority of the MILW Reorganization Court to impose a fair arrangement for the protection of employees (*e.g., Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971)), this case does not in any way implicate the "exclusive and plenary" power of the ICC upon which our nation's railroads are relying so heavily today to avoid their Railway Labor Act obligations. *See*, Sup. Ct. No. 87-1888, *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Assoc.* Rather, the Appendix B conditions must be viewed as preserving the parties' Railway Labor Act obligations, for under the Railway Labor Act, both the MILW Trustee *and* the MILW Reorganization Court were "carriers" subject to all of the Railway Labor Act's obligations. 45 U.S.C. § 151 First; *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 565 (1946). Moreover, the MILW Reorganization Court's authority was further clarified by Section 1167 of the Bankruptcy Code,[3] which provides

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[3] Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976), the statutory provision under which the MILW was reorganized, was repealed by Section 401(a) of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2682. That repeal, however, was not effective for any case commenced under Section 77 prior to the enactment of the Code, except that Section 1167 of the Code was made applicable to any case, such as the MILW reorganization, where a plan of reorganization had not been filed prior to enactment of the Reform Act. *Id.* at § 403(b), 92 Stat. 2683. Moreover, Section 1167 was a reenactment of Section 77(n) of the Bankruptcy Act, 11 U.S.C. § 205(n) (1976), and, thus, it affected no change in the reorganization court's powers or limitations with respect to the Railway Labor Act.

that "neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act . . . except in accordance with section 6 of such Act . . . ." 11 U.S.C. § 1167.

Since the ICC's authority over rail transactions is not implicated by this case, and since the Soo is incorrect, as a matter of law, in implying that the MILW Reorganization Court could authorize the Soo to bargain directly with employees *over the objection of their duly designated representative*, it is clear that the Soo's reliance on any implied authority under the *New York Dock* conditions to engage in such direct bargaining, is misplaced. There is simply no express or implied waiver of the exclusive representation principle in the Employee Protective Agreement.

II. Respondent Soo's Arguments Show The Urgent Need For This Court To Review The Sharply Divided Decision Of The Full Eighth Circuit

When respondent Soo's arguments in opposition to the IAM's petition are examined, it becomes clear that there is a sharp division between petitioner and the Soo as to what is the controlling principle of law in this case. Indeed, the Eighth Circuit's *en banc* decision itself shows this, for besides disagreeing over which tribunal—the federal courts or the adjustment boards—had jurisdiction to determine if the Soo's conduct was unlawful, neither the majority nor the dissenters enunciated a clear rule of law as to what conduct is prohibited or authorized by the Railway Labor Act's exclusive representation principle.

According to the Soo, a railroad may bargain directly with represented employees on matters which do not *conflict* with existing collective bargaining agreements. Soo's Brief in Opp. at 2, 19. That principle of law, the IAM submits, may be the correct inquiry in determining whether an *employee* may set aside his individually ne-

gotiated agreement because it conflicts with a collective agreement. *E.g.*, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347 (1944). However, it is an entirely incorrect and irrelevant inquiry in determining whether *a carrier* may, *over the objection* of the employees' duly designated collective bargaining representative, engage in bargaining with individual employees. *E.g.*, *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of Railroad Telegraphers*, *supra*, 321 U.S. at 346-47.

It is that latter inquiry which is relevant here, for the IAM has clearly and unambiguously objected to the Soo's engaging in direct negotiations with employees whom the IAM represents, concerning separation agreements. That objection raises related questions of whether *Medo Photo's* teachings apply to the Railway Labor Act as *Telegraphers* clearly indicates, and if so, whether the federal courts, or the adjustment boards, have jurisdiction to resolve a dispute over whether the parties have by agreement reserved the area of individual separation agreements for "individual contracting"—*i.e.*, whether there is a clear and express waiver of the exclusivity principle. The National Labor Relations Act's ban against such direct dealing is well understood (*e.g.*, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)), and there is no reason, we submit, why a similar clarity should not exist for the Railway Labor Act. *See*, Pet. at 18.

Because the question of whether a carrier may, over the objection of the employees' collective bargaining representative, bargain directly with its employees for separation agreements presents an issue which is so prevalent today, and so important to the orderly administration of the Railway Labor Act, petitioner submits that this Court should accept this case for review.

CONCLUSION

Petitioner IAM respectfully submits that its petition should be granted. Moreover, since the question presented is fairly simple, the IAM submits that this case is one in which the Court could shorten the normal briefing schedule to enable argument this term.

Respectfully submitted,

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